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In The
Supreme Court of the United States

UNC LEAR SERVICES, INC.
AND LEAR SIEGLER SERVICES, INC.,

Petitioners,

v.

KINGDOM OF SAUDI ARABIA AND
MINISTRY OF DEFENSE AND AVIATION
OF THE KINGDOM OF SAUDI ARABIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Supreme Court has held that, in evaluating whether a foreign government's conduct falls within the commercial activities exception of the Foreign Sovereign Immunities Act ("FSIA") courts must focus on the nature of the conduct that forms the basis of the plaintiff's claims, without regard for its purpose. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992) ("[A] contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods."). In this breach of contract case, which involves a technical services defense contract that the Kingdom of Saudi Arabia expressly designated as "commercial" and expressly agreed was subject to U.S. arms-control regulations, the Fifth Circuit reversed the district court and ruled that the commercial activities exception did not apply because the services provided under the contract involved the maintenance of military F-5 aircraft and were therefore "vital" to a Saudi air defense. Did the Fifth Circuit improperly rely on the purpose, rather than the nature, of the contract in direct contravention of *Weltover*?

2. The Supreme Court permits appellate review of certain collateral orders, such as denials of immunity, only if such review is limited to issues of law. *See Mitchell v. Forsyth*, 472 U.S. 511, 527-28 & n.9 (1985). In this case, the Fifth Circuit engaged in a

QUESTIONS PRESENTED – Continued

fact-intensive review of the district court's denial of FSIA immunity to the Kingdom of Saudi Arabia – making its own entirely new factual findings, many of which were directly contrary to the district court's findings of fact, with no discussion of the appropriate standard of review required to reject the district court's findings of fact. In doing so, did the Fifth Circuit act contrary to the strictures of the collateral order doctrine, and thus outside of its jurisdiction to review the district court's denial of immunity?

RULE 14.1(b) STATEMENT

Petitioners: UNC Lear Services, Inc. and Lear Siegler Services, Inc.

UNC Lear Services, Inc. is a wholly owned subsidiary of Lear Siegler Services, Inc., which is a wholly owned subsidiary of URS Corporation, a publicly traded company.

Respondents: Kingdom of Saudi Arabia and the Ministry of Defense and Aviation of the Kingdom of Saudi Arabia.

RULE 29.6 CORPORATE DISCLOSURE

UNC Lear Services, Inc. is a wholly owned subsidiary of Lear Siegler Services, Inc., which is a wholly owned subsidiary of URS Corporation, a publicly traded company.

There are no parent corporations or publicly held companies owning 10% or more of URS Corporation stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners UNC Lear Services, Inc. and Lear Siegler Services, Inc. (collectively, "LSI") respectfully submit this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the Fifth Circuit is reported at 581 F.3d 210 (5th Cir. 2009), and is reproduced in the Appendix ("App.") hereto at pages 1 to 26. The opinion of the District Court is not officially reported, but is available at 2008 WL 2946059 (W.D. Tex. July 25, 2008), and is reproduced in the Appendix at pages 27 to 86. Although at least one Judge called for a vote on whether rehearing en banc should be granted, the Fifth Circuit ultimately denied panel rehearing and rehearing en banc on September 11, 2009, and that order is reproduced in the Appendix at pages 87 to 88.

JURISDICTION

The Fifth Circuit's Opinion was entered on August 18, 2009. This Petition is timely filed within ninety (90) days of the Fifth Circuit's order dated September 11, 2009 denying LSI's Petitions for Rehearing and Rehearing En Banc. (App. at 1.) The Fifth Circuit's Opinion reviewed, among other things, the district court's decision denying Respondents'

motion to dismiss under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11 ("FSIA"). The Fifth Circuit exercised jurisdiction under the collateral order doctrine. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, provides, in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

28 U.S.C. § 1605(a).

The FSIA defines "commercial activity" as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

STATEMENT OF THE CASE

Background

This lawsuit arises from two commercial contracts[1] between the Kingdom of Saudi Arabia (the "Kingdom") and LSI, a private defense contractor based in the United States. (LRE 6-7, 12, 28-29.)[2] These contracts obligated LSI to provide the Kingdom, and specifically the Royal Saudi Air Force ("RSAF"), with United States technology and United States maintenance, technical, and repair services for

[1] As the District Court found, the Kingdom itself repeatedly characterized both contracts as "commercial." (App. 48, n.11.)

[2] "LRE" refers to LSI's Record Excerpts before the Fifth Circuit.

the RSAF's F-5 aircraft. (Appx. 2-8.)[3] This dispute arises from the Kingdom's refusal to honor its contractual obligations under these agreements.

The TSP Contract

In 1996, the Kingdom entered into what both parties expressly agreed was a "direct commercial contract" (the "TSP contract") for LSI to provide technology and services needed to maintain and repair the RSAF's fleet of F-5 jets. (LRE 3-4, 35; DX 2, Special Provisions ¶ 5.)[4] In connection with the TSP contract, LSI advised the Kingdom that, because of restrictions imposed by the Arms Export Control Act, it could not operate inside the Kingdom "in a commercial capacity" without a technical assistance agreement ("TAA"). (Appx. 35.) The Kingdom signed a TAA, agreeing the TSP was a "direct commercial contract" and subject to "all United States laws and regulations relating to exports and to all administrative acts of the U.S. Government pursuant to such laws and regulations." (LRE 35.)

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[3] "Appx." refers to LSI's Appendix to its Response to the Kingdom's Motion to Dismiss. (Docket Nos. 111-12.) *E.g.*, "Appx. 38" refers to page 38.

[4] "DX" refers to Defendants' Appendix in Support of its Motion to Dismiss. (Docket No. 102.) *E.g.*, "DX 2" refers to Exhibit 2 of Defendants' Appendix.

The SPAGE Contract

LSI and the Kingdom had previously executed the F-5 Spare Parts and Ground Equipment contract (the "SPAGE contract"). (LRE 3-6, 24.) Under this contract, LSI arranged for the repair of F-5 parts that the Kingdom shipped to San Antonio, Texas. (LRE 4.) LSI's TSP personnel in Saudi Arabia identified parts requiring repair under the SPAGE contract and installed repaired parts after SPAGE personnel returned them to Saudi Arabia. (LRE 5-7, 13-14, 21-22.) TSP personnel also provided other support services. (LRE 4-5.) As the district court found, the TSP and SPAGE contracts "served the same underlying purpose" and involved "a high level of coordination and interdependency." (App. 59-60.)[5] The TSP program provided basic maintenance and repair services at the Saudi airfields. (LRE 11.) The SPAGE program coordinated repairs that could not easily be done in the Kingdom. (*Id.*)

The District Court's Factual Findings and Opinion

LSI filed suit in San Antonio after the Kingdom breached both contracts, primarily by failing to pay for LSI's services and then by unjustifiably drawing a performance bond related to the TSP contract in retaliation for LSI pursuing its rights under the

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[5] "KRE" refers to the Kingdom's Excerpts of Record submitted to the Fifth Circuit.

parties' agreements. (App. 42.) After the district court denied the Kingdom's motion to dismiss based on a purported forum-selection clause (KRE 3, 30-32), the Kingdom filed a second motion to dismiss asserting additional grounds, including immunity under the FSIA, the act of state defense, and *forum non conveniens*. (Doc. 101.)[6] The district court permitted the Kingdom to pursue the FSIA and *forum non conveniens* issues, and, after reviewing an extensive evidentiary record, denied the Kingdom's motion to dismiss. (Doc. 142.)

In reaching this conclusion, the district court made detailed factual findings, including findings that the TSP contract was commercial in nature and that the Kingdom's acts caused a direct effect in the United States, thus satisfying the "commercial activities" exception of the FSIA. The court found that the TSP contract, which the Kingdom drafted, refers to itself as a "commercial" contract (App. 48, n.11), and that TSP personnel "provided . . . maintenance" (App. 32, n.5), "[e]ssentially . . . handled the parts that needed to be repaired," and "reinstalled the parts" after SPAGE employees repaired them. (*Id.*) The district court concluded that the TSP contract was the type routinely entered into by private parties, finding that "it is clear that the Kingdom elected to enter into commercial contracts for goods

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[6] "Doc." refers to the District Court's docket entry number in this case. *E.g.*, "Doc. 31:46" refers to page 46 of docket entry 31.

and services to keep its F-5 aircraft air worthy." (App. 53.)

The court expressly rejected the Kingdom's contention that the TSP contract was akin to an employment agreement with civil service or military personnel, finding that "[u]nquestionably, it was LSI who recruited, trained, housed, and hired the individuals under the TSP contract. LSI, not the Kingdom, paid the individuals for their work under the TSP contract. The contracts are replete with references to LSI's obligation to hire quality employees and that the employees will be under the direct supervision of LSI." (App. 55.)

The district court also determined that the Kingdom's acts in connection with the TSP contract caused a direct effect in the United States. The court found that, when the Kingdom entered into the TSP contract, it "bargained for the involvement of LSI's United States operation" and "knew it was dealing with an American company that would suffer harm in the United States if a contract breach occurred." (App. 58.) The court also found that the "purpose of the TSP contract was to purchase United States technology and expertise needed to operate and maintain the Kingdom's aircraft." (*Id.*) LSI assembled this technical expertise in the United States using United States resources, exported it to the Kingdom, and continued to fund its performance under the contract from its accounts in the United States. (*Id.*)

The Fifth Circuit Opinion

On August 18, 2009, the Fifth Circuit issued an Opinion affirming the district court's decision denying the Kingdom's motion to dismiss on *forum non conveniens*, forum selection, and – as to claims under the SPAGE contract – under the FSIA. The Panel, however, reversed the district court's decision not to dismiss claims under the TSP contract, concluding that the Kingdom was immune under the FSIA because that contract was sovereign and not commercial.

In reaching that conclusion, the Panel erroneously focused on the purpose of the TSP (supporting "the operation of a national air defense" or "minimizing the time the aircraft were unavailable for defense"), rather than its nature (contract for "maintenance of the F-5 aircraft"). (App. 12.) In addition, and without considering the proper standard of review of the district court's collateral order, the Panel effectively rejected the district court's factual findings to the contrary, ruling that LSI's TSP employees were "integrated" into the Saudi military and could be considered "military personnel," and made entirely new findings of fact that TSP employees "provided flight operations services" and "trained the pilots in survival skills." (*Id.*)

LSI petitioned the Panel for rehearing and petitioned the Fifth Circuit for rehearing en banc. At least one Judge called for a vote on rehearing, but on

September 11, 2009, the Fifth Circuit denied both requests.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted in this case for at least *four* reasons. **First**, the Fifth Circuit's Opinion conflicts with at least two of this Court's decisions interpreting the commercial activities exception of the FSIA. In *Republic of Argentina v. Weltover*, the Court held that whether an act is "commercial" must be determined by examining the nature of the act without regard for its purpose. 504 U.S. 607, 614-15. "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within in it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.* at 614. The Court in *Weltover* specifically held that "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* at 614-15.

The Fifth Circuit, in direct contravention of *Weltover*, focused on the asserted military purpose of the contract when it held that, "[u]nlike a contract to buy army boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide personnel that were vital to the operation of a national air defense system." (App. 12.) The proper inquiry is whether the Kingdom was acting as a

market participant in purchasing technology and technology related services from LSI. The irony of the Fifth Circuit's holding is that the sale of an F-5 aircraft is commercial, but the maintenance of that same aircraft is sovereign under the court's analysis. By focusing on the military purpose of the TSP contract, the Fifth Circuit's Opinion directly contravenes *Weltover*.

The Fifth Circuit's Opinion also conflicts with this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), which held that courts must focus their analysis under the commercial activities exception by identifying the "particular conduct" that forms the basis or foundation for the plaintiff's claims. *Id.* at 356-57. The Fifth Circuit's Opinion focused on the types of services provided under the TSP contract and whether LSI's employees were "integrated" with the RSAF. Under *Nelson*, these inquiries are irrelevant; the basis for LSI's claim is the Kingdom's failure to honor its payment obligations under the TSP contract – a classic "commercial" dispute that satisfies the commercial activities exception of the FSIA. The Court should grant this Petition to bring the Fifth Circuit into compliance with this Court's directives in *Nelson* and *Weltover*.

Second, this case involves issues of exceptional importance to the American defense contracting industry. The Fifth Circuit's Opinion substantially narrows the "commercial activities" exception to the FSIA, such that a foreign government that contracts for services or personnel used to support any military

function will be immune from suit if it violates that contract. Such a rule would leave U.S. defense contractors that provide services to any military or defense branch of a foreign government with no effective remedy if those governments default on their obligations. Review is needed to address this exceptionally important issue.

Third, the Fifth Circuit's Opinion directly conflicts with decisions from this Court restricting appellate review under the collateral order doctrine. In a series of decisions starting with *Mitchell v. Forsyth*, 472 U.S. 511, 527-25 (1985), this Court has made clear that, under the collateral order doctrine, appellate courts may not review factual disputes. In cases that involve orders denying absolute or qualified immunity to domestic government officials, most circuits explicitly follow this restriction and decline to review factual disputes. But in the FSIA arena, many circuits have departed from this restriction, reviewing fact questions on appeal under the collateral order doctrine for "clear error."

Not only is there an inconsistency among circuits in the review of FSIA appeals and those involving domestic immunity claims, the Fifth Circuit also has an internal split, alternately holding that it has no jurisdiction to review factual findings in an FSIA appeal under the collateral order doctrine, *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 386-87 (5th Cir. 1999) (citing *Mitchell*), or that "underlying findings of fact are reviewed for clear error." *Bd. of Regents of Univ. of Texas Sys. v.*

Nippon Tel. & Tel. Corp., 478 F.3d 274, 279 (5th Cir. 2007) (FSIA case).

In this case, the Fifth Circuit reviewed the district court's decision denying FSIA immunity under the collateral order doctrine, but based its Opinion on facts directly contrary to those found by the district court, which, under *Mitchell* and its progeny, it did not have jurisdiction to do. Among other things, the Fifth Circuit ruled that the TSP contract was "sovereign" because LSI's employees working on the contract supposedly were "integrated" into the RSAF and could be considered "military personnel" providing "vital" services to the Saudi military – a ruling unsupported by the record and that is directly contrary to the district court's factual findings that (i) the TSP was fundamentally a contract for repair and maintenance services, and (ii) LSI's employees could *not* "be considered individual civil servants under the auspices of a direct employment agreement, rather than as employees of LSI." (App. 54.) The Fifth Circuit's Opinion adopted its new set of facts without any discussion of the proper standard of review under the collateral order doctrine.

The Court should grant this Petition to resolve the split among circuits as to the proper standard of review for interlocutory immunity appeals and to bring the Fifth Circuit into compliance with this Court's directive in *Mitchell* and its progeny that factual questions cannot be reviewed on an appeal under the collateral order doctrine.

Fourth, this Petition should be granted so the Court can (i) address an important question identified, but not resolved, by this Court's decision in *Nelson*, and (ii) resolve a circuit split, as explained below.

In *Nelson*, the Court left open the question of how to apply the commercial activities exception in a "mixed" case – *i.e.*, a claim that involves both sovereign and commercial activity. Because *Nelson* involved purely sovereign conduct, the Court declined to address how a mixed case should be analyzed. *See Nelson*, 507 U.S. at 358 n.4, 361-63. The decision, however, strongly suggests that a case involving a breach of contract claim and at least some commercial activity should satisfy the "commercial" activities exception. Here, even if the Fifth Circuit is found to have properly relied on new factual findings, this case is, at best, a mixed one involving both sovereign and commercial elements forming the basis for a classic breach of contract dispute. The Court should grant this Petition to resolve the question left open by *Nelson*.

LSI's Petition also should be granted to resolve a circuit split. In ruling that the TSP contract is sovereign and not commercial, the Fifth Circuit relied on a line of cases addressing employment disputes with consular and civil service personnel, including decisions from the Second and Ninth Circuits. As the D.C. Circuit recently recognized, there is a split in how the circuits, particularly the Second and Ninth Circuits, are addressing these types of disputes. *See*

El-Hadad v. United Arab Emirates, 496 F.3d 658, 664 n.2 (D.C. Cir. 2007). The Court should grant this Petition to address the circuit split.

I. The Fifth Circuit's Opinion Directly Contravenes This Court's Directive in *Nelson* and *Weltover* to Focus on the Nature (and Not the Purpose) of the Particular Conduct at Issue.

The FSIA is the sole basis for obtaining jurisdiction over a foreign sovereign in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). A foreign sovereign is immune from suit unless one of the statutory exceptions applies. *See id.* at 438-39. The "most significant" exception is the "commercial activity" exception set forth in 28 U.S.C. § 1605(a)(2). *See Weltover,* 504 U.S. at 611. Under this section, a sovereign is not immune in any case "in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

In *Nelson*, this Court emphasized that the starting place for an analysis under the commercial activities exception is to identify the *particular conduct* that forms the basis for the plaintiff's claims. *See Nelson,* 507 U.S. at 356 ("We begin our analysis by identifying the particular conduct on which the [plaintiffs'] action is 'based' for purposes of the

[FSIA]."). The next step is to analyze whether that conduct was "in connection with a commercial activity" of the sovereign. *See id.* at 357-58; 28 U.S.C. § 1605(a)(2). The FSIA makes clear that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

In *Weltover*, this Court emphasized that the question is not whether the foreign government is acting with a profit motive or some uniquely sovereign objectives. *Weltover*, 504 U.S. at 614. "Rather, the issue is whether the *particular actions* that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.* (first emphasis added; citation omitted). "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.*

Applying this standard, this Court held that "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Weltover*, 504 U.S. at 614-15. Following *Weltover*, "courts typically hold that contracts for the procurement of goods and services are commercial rather than governmental in nature." *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1384 (5th Cir. 1992); *see also Adler v. Federal*

Republic of Nigeria, 219 F.3d 869, 875 (9th Cir. 2000) ("a contract for services is plainly commercial in nature."); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985) ("[A] contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign immunity does not apply.").[7]

The proper analysis under *Weltover* is illustrated in *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006), a case involving Peru's promise of a reward for information leading to a fugitive's capture. The plaintiff provided such information, Peru refused to pay, and the plaintiff sued. *Id.* at 1292-94. Peru claimed immunity because locating and capturing a fugitive was an inherently governmental act. *Id.* at 1295. The Eleventh Circuit disagreed, explaining that

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[7] *Accord Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 287-89 (4th Cir. 2004) (contract to supply private company with uranium hexaflouride extracted from nuclear weapons was commercial); *Ministry of Def. v. Cubic Def. Sys., Inc.*, 385 F.3d 1206, 1211, 1220-22 (9th Cir. 2004) (contract for sale and servicing of Air Combat Maneuvering Range was commercial), *vacated on other grounds*, 546 U.S. 450 (2006); *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1302 (11th Cir. 2000) ("'[A] foreign state's purchase of grain from a private dealer would always be regarded as commercial.'") (citation omitted); *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992) ("The negotiation of contracts, including entry into a settlement agreement, clearly is the type of act performed by private persons."); *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 3-4 (D.D.C. 1999) (contract for sale of MiG-29 fighters was commercial).

Peru abandoned its immunity when it chose to enter the commercial marketplace:

> Peru "did not have the resources or the . . . expertise" it needed to get the job done. After the trail ran cold, Peru "ventured into the marketplace," to buy the information needed to get its man. [The plaintiff] provided that information for a price, the price being the five million dollars that Peru had offered to pay for it. The underlying activity at issue – the exchange of money for information – is "commercial in nature and of the type negotiable among private parties."

Id. at 1299 (ellipsis in original; citations omitted); *see also Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109-10 (5th Cir. 1985) (the breach of contractual obligations is "commercial" conduct).

Although the Fifth Circuit acknowledged that controlling authority required it to look at the nature, and not the purpose, of the TSP, the Opinion attempts to distinguish *Weltover* on the ground that "[u]nlike a contract to buy boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide personnel that were vital to the operation of a national air defense." (App. 12.) But this assertion only confirms that – in direct contravention of *Weltover* – the Fifth Circuit relied on the purpose of the TSP contract.

By focusing on the *purpose* of the TSP contract (services "vital to the operation of a national air defense" or "minimizing the time aircraft were

unavailable for defense"), the Panel directly contravened *Weltover* and the directive to base its determination on the nature of the conduct at issue (entering into an agreement to purchase technical, maintenance and administrative services and the breach of that agreement). (App. 12.) It is difficult to imagine how boots or bullets are any less "vital to the operation" of a sovereign's military than technical and repair services for military aircraft. And if the sale of a jet aircraft is commercial in nature, *Walter Fuller*, 965 F.2d at 1377, 1384-86, a contract to maintain and service that same jet can be no less commercial in nature, even though the purpose of both unquestionably is to support "the operation of a national air defense."

Moreover, by distinguishing "boots and bullets" from "personnel," the Fifth Circuit's Opinion can be read to create an entirely new distinction between "goods" and "services" under the commercial activities exception to the FSIA, notwithstanding that neither the FSIA nor controlling precedent differentiates between the two. *See generally* 28 U.S.C. § 1603(d); H.R. Rep No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614-15 ("the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant. . . ."); *see also Walter Fuller*, 965 F.2d at 1384; *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras,* 129 F.3d 543, 547-48 (11th Cir. 1997).

In support of its analysis, the Fifth Circuit improperly relied on and expanded inapposite cases

from other circuits, most notably *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000). The conduct at issue in *Butters* was the Saudi decision not to have a woman work on the security detail for the Royal Family. *Id.* at 464-65. The plaintiff sued over this decision, alleging sex discrimination. The court found the decision regarding who would guard the Royal Family involved "political, cultural, and religious" considerations and was therefore sovereign. *Id.* ("Indeed, it is difficult to imagine an act closer to the core of a nation's sovereignty."). Citing *Butters*, the Panel in the instant case improperly concluded that "[m]aintaining an air defense system is a similarly sovereign act" and thus the TSP contract's subject matter did not fall within the FSIA's commercial activity exception. (App. 13.)

Butters does not apply to this case, and the Fifth Circuit's reliance on *Butters* illustrates how it disregarded *Nelson*'s directive to identify and focus upon the "particular conduct" that forms the basis in LSI's claims. The "particular conduct" challenged in *Butters* is the decision that a specific female employee could guard the Royal Family. In this case, the "particular conduct" underlying LSI's claims is the Kingdom's refusal to pay for services rendered under its contracts with LSI. LSI personnel were not foreign Legionaries, and this case has nothing to do with "political, cultural, [or] religious" issues. Under well-established precedent, the Kingdom is not immune from having to honor its contracts. *See* Restatement (Third) of Foreign Relations § 453 cmt. b (1987) ("An

activity is deemed commercial . . . if it is concerned with . . . performance of or contracting for the performance of services. . . .").

II. LSI's Petition Should Be Granted to Address an Issue of Exceptional Importance to the U.S. Defense Industry and National Security.

The Fifth Circuit's Opinion threatens to undermine one of the primary methods available under U.S. law to provide military goods and services to foreign governments. The Arms Export Control Act, 22 U.S.C. §§ 2751 to 2799aa-2, controls the sale of U.S. military goods and services. Under the Act, there are two methods by which a foreign government can purchase military equipment and services from U.S. defense contractors – direct commercial sales ("DCS") agreements and foreign military sales ("FMS") agreements. *Secretary of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 703 (4th Cir. 2007) (providing background on defense contracting industry and defense contracts with foreign governments).

DCS transactions are effectuated through a direct commercial contract between the foreign government and the U.S. defense contractor. FMS agreements are executed directly by the U.S. and the foreign government; the U.S. purchases the goods or services from the private defense contractor (paying the defense contractor directly) and provides them to

the foreign government. *Id.* Each method has advantages and disadvantages, but there "is no dispute that in a DCS transaction, a foreign government directly contracts with the domestic manufacturer and can sue that manufacturer on the direct agreement." *Id.* at 707.

Here, the TSP is a DCS contract, and the Fifth Circuit's ruling that the Kingdom is immune from suit threatens the viability of DCS arrangements. The Fifth Circuit reversed because it believed LSI's employees working on the TSP contract were providing services "vital" to the Saudi military and could be considered "military personnel." (App. 12.) But in virtually any case where a U.S. defense contractor is providing military-related services to a foreign government, it could be said that the services are "vital," or that the contractor's employees, who often work closely with the foreign government, could be considered "military personnel." The rule set forth in the Fifth Circuit's Opinion will effectively preclude U.S. defense contractors that provide services to foreign governments from having any effective remedy, leaving the contractor – and the U.S. military technology provided by the contractor – at the whim of the foreign government.

The importance of this case is highlighted by the Technical Assistance Agreement ("TAA") signed by the Kingdom in connection with the TSP contract. Because the military technology and services provided under the TSP contract were subject to the Arms Export Control Act, the Kingdom had to sign

the TAA, agreeing to comply with "all United States laws and regulations relating to exports and to all administrative acts of the U.S. Government pursuant to such laws and regulations" – which included the restrictions of the International Traffic in Arms Regulations, 22 C.F.R. subch. M, §§ 120-30, and its restrictions on re-exporting U.S. military technology to certain countries like Iran. (LRE 3-4, 35.) Taken to its logical conclusion, the Fifth Circuit's Opinion means that U.S. courts would not be able to enforce the Kingdom's agreement to comply with these regulations. A foreign government could transfer U.S. military technology to Iran or North Korea, without any legal recourse in the United States, thereby undermining the Arms Control Export Act and national security. Review is needed to address these exceptionally important issues.

III. The Fifth Circuit's Decision Contravenes this Court's Decisions Limiting Appellate Jurisdiction Under the Collateral Order Doctrine to Reviewing Issues of Law.

The Fifth Circuit's Opinion directly conflicts with decisions of this Court restricting appellate jurisdiction under the collateral order doctrine to reviewing legal issues. Without addressing the standard of review, and without attempting to resolve its own conflicting decisions regarding the proper standard of review in FSIA cases, the Fifth Circuit based its Opinion on new findings of facts not mentioned by the district court (or found in the record) and other facts

contrary to the district court's findings. The Court need not substantively evaluate or resolve any of the these factual inconsistencies to decide this appeal; it need only note that the facts relied on by the Fifth Circuit are different from those found by the district court and therefore outside the permissible scope of the Fifth Circuit's review under the collateral order doctrine.

The collateral order doctrine is a deliberately narrow exception to the final judgment rule. Under this doctrine, certain interlocutory appeals are permitted, but only in a "small class" of cases that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).[8] In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court allowed an interlocutory appeal from the denial of a claim of qualified immunity from suit for domestic government officials. Based on *Mitchell*'s rationale, courts of appeal have agreed that the collateral order doctrine also permits interlocutory appeals of denials of foreign entities' claims of

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[8] The Court has repeatedly emphasized the narrowness of this doctrine, reasoning that a broad application would "overpower the substantial finality interests § 1291 is meant to further." *Will v. Hallock*, 546 U.S. 345, 350 (2006); *see also id.* ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope."). The conditions for expanding the collateral order doctrine to a class of cases are "stringent." *Id.* at 349; *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

immunity under the FSIA. *See, e.g.*, *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Ct.*, 859 F.2d 1354, 1358 (9th Cir. 1988) (citing *Mitchell*); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346-47 (7th Cir. 1987) (same).

In a series of decisions beginning with *Mitchell*, this Court has made clear that under the collateral order doctrine, appellate courts are not to review factual disputes. *See Mitchell*, 472 U.S. at 528 n.9 ("emphasiz[ing] . . . that the appealable issue is a *purely legal* one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law.") (emphasis added); *see also Johnson v. Jones*, 515 U.S. 304, 313 (1995) (recognizing that *Mitchell*'s holding "referred specifically to a district court's 'denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*'") (quoting *Mitchell*, 472 U.S. at 530); *Behrens v. Pelletier*, 516 U.S. 299, 311-13 (1996) (again invoking *Mitchell*'s statement that "an order denying qualified immunity, *to the extent it turns on an 'issue of law,'* is immediately appealable," and noting that "*Johnson* reaffirmed that summary judgment determinations are appealable when they resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity" (emphasis added)); *cf. Mohawk Indus., Inc. v. Carpenter,* No. 08-678, 2009 WL 4573276, at *7 (U.S. Dec. 8, 2009) (observing that "appellate deference is the norm" for a district court's "factual determinations").

In cases that involve orders denying absolute or qualified immunity to domestic government officials, most Circuits follow this restriction to legal questions and decline to review factual disputes. *See, e.g., Jones v. Parmley*, 465 F.3d 46, 64 (2d Cir. 2006) (Sotomayor, J.) ("Under the collateral order doctrine, 'a district court's denial of a claim of qualified immunity, *to the extent that it turns on an issue of law [and not of fact]*, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.'") (emphasis added) (quoting *Mitchell*, 472 U.S. at 530); *Shehee v. Luttrell*, 199 F.3d 295, 299 (6th Cir. 1999) ("[I]n order for an interlocutory appeal to be appropriate, a defendant seeking qualified immunity must be willing to concede to the facts as alleged by the plaintiff and discuss only the legal issues raised by the case.").[9] As Justice Ginsburg aptly remarked at oral argument in another case earlier this Term, the collateral order doctrine "was meant for the kind of question that doesn't get you into the facts. Otherwise, . . . once it's a fact-bound question, you are really eroding the final judgment rule." Transcript of Oral Argument at

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[9] *Accord Blake v. Wright*, 179 F.3d 1003, 1008 (6th Cir. 1999) (noting that courts of appeal must "review interlocutory appeals concerning qualified immunity on purely legal grounds and leave all factual issues for trial") (citing *Johnson*, 515 U.S. at 313-18); *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 633 (5th Cir. 1999) (recognizing that "appellate jurisdiction does not allow us to review [the] district court's factual findings" in considering the interlocutory appeal of a district court's denial of qualified immunity).

14-15, *Mohawk Indus., Inc. v. Carpenter*, (U.S. Oct. 5, 2009) (No. 08-678).

But in the FSIA arena, some courts have departed from this restriction and reviewed fact questions on appeal under the collateral order doctrine for "clear error."[10] The Fifth Circuit itself has addressed this question inconsistently, alternately holding that it has no jurisdiction to review the district court's factual findings in an FSIA appeal under the collateral order doctrine and "ha[s] authority to decide *only* legal issues," *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 386 (5th Cir. 1999) (citing *Mitchell*; emphasis in *Byrd*; quotation marks omitted), or that "underlying findings of fact are reviewed for clear error," *Bd. of Regents of*

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[10] *See, e.g.*, *Filler v. Hanvit Bank*, 378 F.3d 213, 216 (2d Cir. 2004) (reviewing the district court's factual findings for "clear error" on interlocutory appeal pursuant to the collateral order doctrine from order denying immunity under the FSIA); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (same). LSI does *not* contest the propriety of clear error review when the appeal from an FSIA immunity decision is *not* interlocutory and thus not pursuant to the collateral order doctrine. *Cf., e.g.*, *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 235 (2d Cir. 2002) (applying clear-error review to district court's factual findings in its *dismissal* based on the FSIA); *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 661-62 (D.C. Cir. 2007) (reviewing for clear error the district court's "detailed findings after a bench trial" that resulted in the court denying immunity and entering judgment on the merits); *see also id.* at 669 (determining that "weak" or "vague" evidence was "enough under our 'clearly erroneous' standard of review").

Univ. of Texas Sys. v. Nippon Tel. & Tel. Corp., 478 F.3d 274, 279 (5th Cir. 2007) (FSIA case).[11]

This case illustrates how this confusion and split in authorities interfere with the application of this Court's directive that factual disputes are not to be reviewed under the collateral order doctrine. Here, the Fifth Circuit reviewed the district court's FSIA decision under the collateral order doctrine, yet it undertook a plenary examination of the facts, resulting in fact-intensive determinations by an appeals court giving little to no deference to the district court. It did so without addressing the standard of review under the collateral order doctrine, and the resulting Opinion relies on facts directly contrary to those expressly found by the district court. Under *Mitchell* and its progeny, the Fifth Circuit lacked jurisdiction to do this.

In particular, the Fifth Circuit's Opinion states that LSI's employees under the TSP contract: (i) "were integrated with the RSAF," (ii) "were vital to the operation of a national air defense system," and (iii) "can be considered military personnel." (Opinion at 9.) (App. 12.) Respectfully, there is *no support* in

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[11] The FSIA involves a burden-shifting analysis. Because the Kingdom is a "foreign state" under the FSIA, LSI has the burden, at the motion to dismiss stage, to present allegations or evidence showing that one of the exceptions to immunity applies. *Byrd*, 182 F.3d at 388. The Kingdom, however, retains the ultimate burden of persuasion that none of the relevant exceptions to immunity applies. *See id.*

the record for the assertion that the LSI personnel were "integrated" into the RSAF or could "be considered military personnel." The Kingdom submitted no evidence that any LSI employee fired a weapon, wore a Saudi uniform, followed the RSAF chain of command, served in combat, or was involved in making military decisions. To the contrary, the district court expressly found that "*[u]nquestionably, it was LSI who recruited, trained, housed, and hired the individuals under the TSP contract. LSI, not the Kingdom, paid the individuals for their work under the TSP contract. The contracts are replete with references to LSI's obligation to hire quality employees and that the employees will be under the direct supervision of LSI.*" (App. 55.) These findings establish that these were civilian employees of a private U.S. defense contractor, not military personnel.

The record also contains no support for the Fifth Circuit's statement that LSI's employees were providing "vital" services that were "sovereign" in nature. The district court concluded that the TSP contract was of the type entered into regularly by private parties, finding that "it is clear that the Kingdom elected to enter into commercial contracts for goods and services to keep its F-5 aircraft air worthy." (App. 53.) In so doing, the district court expressly *rejected* the Kingdom's assertion that LSI's employees were "so enmeshed in the daily activities and operations of national security" that the underlying acts were sovereign. (App. 51.)

Finally, the Fifth Circuit ignored the Kingdom's own admissions regarding the commercial nature of the TSP contract. Before this litigation began, the Kingdom repeatedly stated that the TSP contract is "commercial":

- The TSP contract refers to itself as a "commercial contract." (DX 2, Annex B-SOW, at chart directly after page 2-11.)
- The Kingdom referred to the TSP as a "Direct Commercial Contract." (Appx. 161-65.)
- A senior RSAF official wrote LSI that the TSP contract was a "direct commercial contract." (Appx. 140.)

This Court need not resolve these factual issues. It need only note that the facts recited by the Fifth Circuit are materially different from those found by the district court. By relying on its independent gloss on the facts of this case, the Fifth Circuit effectively made an interlocutory appeal dependent on questions of fact and not merely of law. In doing so, the court went beyond its limited jurisdiction for reviewing the collateral order denying the Kingdom's motion. As this Court has pointed out, allowing a collateral appeal to turn on the facts of a particular case "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule – 'that of maintaining the appropriate relationship between the respective courts. . . . This goal, in the absence of most

compelling reasons to the contrary, is very much worth preserving.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (internal quotations omitted).[12]

The Court should arrest the Fifth Circuit's erosion of the final judgment rule by granting this Petition, resolving the split on the proper standard of review for interlocutory immunity appeals, and bringing the Fifth Circuit into compliance with this Court's directive in *Mitchell* and its progeny that factual questions cannot be reviewed on an appeal under the collateral order doctrine.

IV. LSI's Petition Should Be Granted to Address a Question Left Open in *Nelson* and to Resolve a Circuit Split.

As set forth above, LSI's Petition should be granted because the Fifth Circuit's Opinion directly conflicts with controlling decisions of this Court restricting appellate review under the collateral order doctrine to legal issues. But even accepting the new

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[12] As the Court pointed out last Term in *Iqbal*, "*Johnson* held that the collateral orders that are 'final' under *Mitchell* turn on 'abstract,' rather than 'fact-based,' issues of law" because conducting a fact-related legal inquiry "generally involves matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009) (citing *Johnson v. Jones*, 515 U.S. 309, 314-17 (1995)).

facts relied on by the Fifth Circuit, LSI's Petition should be granted for at least two additional reasons.

First, the new facts proffered by the Fifth Circuit directly implicate an important issue identified but not resolved by this Court's decision in *Nelson*. In that case, the Court addressed a claim for personal injuries based on allegations that Saudi police officers abused the plaintiff. *Nelson*, 507 U.S. at 351-54. The Court ruled that this specific conduct was an exercise of police power and purely governmental, but explicitly left open the question of how to apply the commercial activities exception in a "mixed" case that involves sovereign and commercial elements. *Id.* at 358 n.4 ("[W]e do not address the case where a claim consists of both commercial and sovereign elements").

The Eleventh Circuit confronted just such a mixed case in *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543 (11th Cir. 1997). The case involved a contract dispute over an agreement to provide goods and services to Honduras in connection with its civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. *Id.* at 547-48. The court noted that the FSIA analysis was "complicated" because the contract involved "both commercial rights and Honduras' sovereign right to register aircraft." *Id.* at 548. The court nonetheless ruled that the commercial activities exception applied because "[a]ny party, sovereign or not, could contract for those [aircraft technical

assistance and inspection] goods and services." *Id.* at 548-49.

In this case, the Fifth Circuit's Opinion, and particularly the new facts it relied on, directly implicate the unresolved question from *Nelson*. The Panel expressly found that at least some LSI personnel performed strictly maintenance services, (App. 12), which are unquestionably "commercial" in nature. *See* H.R. Rep No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 ("foreign government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents" is commercial).

But the Panel concluded that the contract as a whole was "sovereign," without analyzing which standard should be applied if a contract has *both* commercial and sovereign elements.[13] In other words, if LSI were to provide the services of one spy and 99 cooks, the Fifth Circuit's reasoning would implicitly render the *entire* contract sovereign such that LSI could not recover for any of the services provided even though the vast majority of those services were clearly commercial. But under the Eleventh Circuit's analysis in *Honduras Aircraft*, the TSP contract should be considered "commercial" even if there were sovereign elements to its performance, and at a

[13] LSI does not concede that any "sovereign" services were provided under the TSP contract and submits that the record is devoid of any such evidence.

minimum, LSI should be able to recover for the commercial services provided under the contract. Either way, the Court should grant LSI's Petition to resolve the issue left open in *Nelson*.

Second, LSI's Petition should be granted because the new facts relied on by the Fifth Circuit implicate a line of cases in which there is a circuit split. Based on its conclusion that LSI's TSP employees could "be considered military personnel," the Fifth Circuit relied on a line of cases that arise in the context of employment disputes between foreign governments and consular or civil service personnel. (App. 13.) In large part, these cases do not apply the analysis mandated by this Court's decisions in *Weltover* and *Nelson*, and instead focus on a portion of the legislative history of the FSIA stating that the "employment of diplomatic, civil service, or military personnel" is "not commercial in nature." H.R. Rep No. 94-1487, at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6615.

As the D.C. Circuit noted in a recent opinion, the circuits have adopted divergent approaches and tests in these cases. *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 664 n.2 (D.C. Cir. 2007). In that case, the D.C. Circuit explained its two-step approach, which first examines whether the plaintiff is a civil servant (or diplomat or soldier). If so, the defendant has immunity; if not, the D.C. Circuit goes on to examine whether the plaintiff's work involves the exercise of powers that can be exercised by private

citizens, as distinct from those powers peculiar to sovereigns. *Id.* at 664.

In contrast, the Second Circuit treats the question of whether the plaintiff is a civil servant, diplomat or soldier as merely an "example" to be used in making the "central" commercial-governmental distinction. *Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004) (employee of Japanese agency providing general business development assistance was not engaged in commercial activity). The Ninth Circuit treats the civil servant question as effectively superseding the commercial-governmental distinction. *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996) (consulate's employment of commercial development officer was commercial because plaintiff did not exercise discretionary or policy-making power typical of civil servant or diplomat). And the Seventh Circuit melds these questions together, such that the exercise of governmental power becomes the mark of a civil servant, while the exercise of power common to private citizens marks a commercial employee. *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164-66 (7th Cir. 1987) (employee of Spain's Commercial Office who was working to market Spanish wines could maintain suit for breach of contract).

Although LSI submits that these cases do not apply because the relevant conduct here is the breach of a commercial contract with a private U.S. defense contractor (and not the employment of a civil servant or military officer), the Fifth Circuit's reliance on this line of cases in support of its conclusion that LSI's

TSP employees could "be considered military personnel," coupled with the recognized circuit split in how to analyze these cases, further supports LSI's Petition. The Court should grant this Petition to address the circuit split.

CONCLUSION

The Court should grant this Petition for four reasons:

1. By basing its decision on whether the services provided under the TSP contract were "vital" to the Saudi air defense and whether LSI's employees were "integrated" into the Saudi military, the Fifth Circuit's Opinion directly conflicts with this Court's decisions in *Nelson* and *Weltover* directing courts to determine whether the commercial activities exception is satisfied by analyzing the nature (and not the purpose) of the particular conduct of the defendant that forms the basis for the suit;

2. This appeal raises exceptionally important issues to the American defense industry and national security, including whether foreign governments are immune from suits seeking to enforce direct commercial sales agreements transferring U.S. military technology;

3. By relying on new facts not mentioned by the district court, as well as facts contrary to those found by the district court, the Fifth Circuit's Opinion directly conflicts with this Court's decision in *Mitchell* and its progeny restricting appellate jurisdiction under the collateral order doctrine to reviewing legal issues; and

4. Even if one were to accept the new facts found by the Fifth Circuit, this Petition should be granted to (i) address the important question this Court identified but did not resolve in *Nelson*, namely what to do in a mixed case involving both commercial and sovereign elements; and (ii) resolve the circuit split in decisions addressing employment disputes involving civil service and consular personnel.

For these reasons, LSI respectfully requests that the Court grant this Petition and review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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United States Court of Appeals,
Fifth Circuit.
UNC LEAR SERVICES, INC., and Lear Siegler Services, Inc., Plaintiffs-Appellees,
v.
KINGDOM OF SAUDI ARABIA, and Ministry of Defense and Aviation of the Kingdom of Saudi Arabia, Defendants-Appellants.
Nos. 08-50857, 08-51103.

Aug. 18, 2009.

Charles W. Schwartz (argued), Wallis M. Hampton, Noelle M. Reed, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Houston, TX, for Plaintiffs-Appellees.

David B. Bergman (argued), Arnold & Porter, Washington, DC, for Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas.

Before DAVIS, OWEN and HAYNES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

The dispute before us is between the Kingdom of Saudi Arabia and the Ministry of Defense and Aviation of the Kingdom of Saudi Arabia (Defendants-Appellants, collectively the "Kingdom") and UNC Lear Services, Inc., a domestic corporation, and its subsidiary, Lear Siegler Services, Inc. (Plaintiffs-Appellees, collectively "Lear"). The Kingdom appeals the following rulings by the district court: (1) denial of the Kingdom's motion to dismiss based on its claim of immunity under the Foreign Sovereign Immunities

Act, (2) denial of the Kingdom's motion to dismiss based on its argument that the contracts between the parties contain a mandatory forum-selection clause naming Saudi Arabia as the only available forum, and (3) denial of the Kingdom's motion to dismiss for forum non conveniens. For the following reasons, we reverse the district court's order denying the Kingdom's motion to dismiss based on sovereign immunity with regard to claims brought by Lear under one of the contracts (the TSP), and we affirm all other orders appealed from.

I. *Facts and Procedural Background*

A. *Facts*

The Kingdom maintains a fleet of F-5 aircraft as part of its air defense systems. It purchased these aircraft from the United States under the Peace Hawk Foreign Military Sales Program. Initially, the United States contracted directly with the Kingdom to provide support and maintenance for the fleet. The United States then contracted with third-party service providers such as Lear to fulfill the terms of those support agreements. In the mid-1990s, the Kingdom began entering into agreements directly with the third-party service providers to obtain maintenance and support for the fleet of aircraft.

In 1995, Lear and the Kingdom entered into the F-5 Spare Parts and Ground Equipment contract ("SPAGE"). Under this contract, F-5 parts and components that needed repair were shipped from

Saudi Arabia to Lear in San Antonio. Lear inspected the parts to determine what repairs were necessary, and communicated the expected cost to the Kingdom. If the Kingdom approved the repairs at that cost, Lear solicited bids for the repairs, and once the repairs were complete returned the parts to Saudi Arabia. To pay for the repairs, the Kingdom funded an irrevocable letter of credit ("LOC"). The SPAGE contract required Lear to provide monthly updates to the Kingdom of the current amount available through the LOC. If the amount was below the amount necessary to cover expected shipments of parts, Lear was to promptly notify the Kingdom, at which time the Kingdom, at its discretion, could replenish the LOC. Lear in turn was required to provide a performance bond to the Kingdom, also in the form of an LOC, equal to 5% of the contract value, or $1.2 million.

In 1996, the Kingdom awarded Lear a service contract, the F-5 Technical Support Program contract ("TSP"). Under the TSP, Lear sent hundreds of personnel to Saudi Arabia to provide training and support services to the Royal Saudi Air Force ("RSAF"). These employees were integrated with RSAF personnel, and provided training and support in post-ejection survival, photo reconnaissance, flight operations, tactics and weapons to the RSAF. They worked directly for and under the control of the RSAF. Lear employees were responsible for developing and coordinating emergency action procedures for the pilots of the F-5 aircraft. Others provided

training to the RSAF in fighter weapons and tactics. As with the SPAGE contract, Lear was required to put up a performance guarantee bond for $5.6 million which represented 5% of the total cost of the contract. The Kingdom had the right to retain the bond until the contract was completed, and had the right to withhold the last payment due under the contract (to be no less than 10% of the total contract cost) until the contract was closed out. The final payment amount under the TSP was approximately $12.2 million, and Lear alleges the Kingdom has unjustifiably refused to pay this amount.[1]

Lear also alleges that in 1998, the Kingdom's LOC funding the SPAGE contract was depleted due to the Kingdom's failure to fund the LOC, and Lear had no mechanism to obtain payment for its services. After 1998, Lear alleges it worked with the Kingdom to prioritize repairs that needed to be made and that the Kingdom provided additional funds for these repairs. Lear also cancelled some outstanding repairs and continued to store other parts. Lear accepted at least one additional shipment of parts after the LOC was depleted. The Kingdom maintains that Lear

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[1] Lear also contends that the Kingdom coerced it into renting housing at the Al Bilad complex from a friend of the royal family at an exorbitant price. Lear seeks to recover the difference in amounts paid and the cost of other available housing. The Kingdom defends its nonpayment under the TSP contract by pointing to the failure by Lear to pay Saudi taxes that were due, and failure to deliver a certificate evidencing such payment.

should have rejected all shipments after the LOC funds were insufficient to cover repairs.

When the SPAGE contract expired in 1999, Lear had a number of F-5 parts in storage in its San Antonio facility and continues to store these. Lear has received no payment for the storage costs. The Kingdom argues that Lear retained these parts as a gesture of goodwill, that Lear had no obligation to store the parts, and that the Kingdom has no obligation to pay for the storage. The Kingdom states that it instructed Lear to return the parts and Lear refused. Lear argues that the United States Air Force instructed the Kingdom that the parts could not be returned until the contract was properly terminated. Lear communicated this in a letter to the Kingdom in 2002.

In 2003 and 2004, Lear met with the Kingdom in an attempt to resolve their contractual disputes and close out both contracts. In particular, Lear complained of the following:

- The Kingdom improperly withheld the final payment due under the TSP contract, approximately $12.2 million, due to the alleged failure by Lear to pay taxes. Lear claims the Kingdom's argument that back taxes have not been paid is the result of the Kingdom's misrepresentation of Lear's income under the TSP contract to the taxing authority.

- The Kingdom improperly extended and eventually drew down Lear's $5.6 million performance bond under the TSP contract.
- The Kingdom's order that Lear rent an expensive housing complex shifted inordinate and unjustified expense to Lear. Lear was forced to comply or risk losing the TSP contract.
- Under the SPAGE contract, Lear has incurred significant uncompensated storage costs for storing the F-5 parts in its San Antonio warehouse.

The meetings between Lear and the Kingdom did not resolve any of these issues.

B. *Procedural Background*

In 2004, Lear filed this suit against the Kingdom in the Western District of Texas. Lear made claims under both the TSP and SPAGE contracts, alleging that the Kingdom breached both contracts in the manner stated above. The Kingdom moved to dismiss the suit on grounds that the contracts contained forum-selection clauses that required any litigation to take place in Saudi Arabia. The district court denied the motion, and determined that these clauses were permissive rather than mandatory forum-selection clauses. The Kingdom then moved to dismiss on the grounds of (1) sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"), (2) for forum non conveniens, and (3) the act of state doctrine. The

district court allowed jurisdictional discovery on the FSIA and forum non conveniens issues. After conducting a hearing and reviewing the evidence presented, the district court found that the Kingdom's actions under both contracts fell within the commercial activities exception of the FSIA, therefore subjecting the Kingdom to the jurisdiction of the district court. The district court also denied the motion to dismiss on grounds of forum non conveniens. It found that Saudi Arabia was an available and adequate forum, but determined that the public and private factors weighed in favor of Texas.

At the Kingdom's request, the district court certified for appeal to this court under 28 U.S.C. § 1292(b) the orders denying the Kingdom's motions based on the forum-selection clauses and for forum non conveniens. The Kingdom also appeals the district court's order denying its motion to dismiss based on its claims of sovereign immunity under the FSIA. The denial of immunity under the FSIA is immediately appealable to this court and that issue is before us as well. The Kingdom also argues that the act of state doctrine bars American courts from considering the actions of the Saudi taxing authority and the Kingdom's actions related to the Al Bilad housing complex.

II. *Discussion*

We consider below 1) whether the FSIA permits us to exercise jurisdiction over the Kingdom; 2) whether

the forum-selection clauses in the contracts require us to yield to the Saudi forum; and 3) whether the district court abused its discretion in denying the Kingdom's motion to dismiss for forum non conveniens. For the reasons stated, we do not consider the Kingdom's act of state defense.

The issue of jurisdiction under the FSIA "is a question of law which this Court reviews de novo." *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 386 (5th Cir.1991). Lear argues that the district court's decision to treat the TSP and SPAGE contracts as related is a finding of fact and as such must be reviewed for clear error, however, "[c]ontract interpretation is a question of law which we review de novo." *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 609 (5th Cir.2000). The district court's denial of the motion to dismiss for forum non conveniens is reviewed for an abuse of discretion. *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 787 (5th Cir.2007).

A. *Foreign Sovereign Immunities Act*

The Kingdom argues that the FSIA precludes a United States court from exercising jurisdiction over these actions against it. The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102

L.Ed.2d 818 (1989). Under the FSIA, "a foreign state is presumptively immune from jurisdiction of the United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). Lear contends that it is entitled to bring this action against the Kingdom under the "commercial activity" exception to the FSIA. This exception is recognized under subsection § 1605(a)(2) of the FSIA which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). Lear contends that both the TSP and SPAGE contracts involved the purchase and sale of goods and services, and that they are commercial. Although Lear does not contend that the Kingdom acted in the United States, they argue that

its purchase of goods and services under the contracts had a direct effect in the United States.

Commercial activity is defined by the FSIA as:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

§ 1603(d). The Supreme Court provided a helpful explanation of the commercial activity exception in *Republic of Argentina v. Weltover,* 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). There, it said:

> [W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and

> traffic or commerce," Black's Law Dictionary 270 (6th ed.1990). Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods. . . .

504 U.S. at 614-15, 112 S.Ct. 2160.

In reviewing the district court's denial of the Kingdom's motion to dismiss under the FSIA, we must first consider Lear's argument that the SPAGE and TSP contracts must be read together as a single contract. We interpret a contract de novo, or as a question of law. *Alliance Health Group, LLC v. Bridging Health Options, LLC,* 553 F.3d 397, 399 (5th Cir.2008). The district court concluded that the contracts were for the performance of closely related services and should be read together. We disagree.

In instances where documents are "executed at the same time, with the same purpose, and in the course of the same transaction, we construe the agreements together." *Calpetco 1981 v. Marshall Exploration, Inc.,* 989 F.2d 1408, 1412 (5th Cir.1993). Here, the contracts were entered into a year apart as the result of separate bidding processes. The two contracts are for the purchase of different goods and services and do not refer to each other. Moreover, the TSP contract contains a merger clause that states

"This Contract embodies the entire agreement between the Government and Contractor relating to the Work, and the parties will not be bound by or be liable for any statement, representation, promise, inducement or understanding of any kind or nature relating to the Work which is not set forth or provided for herein." Although performance under the two contracts may be related, the contracts were distinct and separate. Therefore, based on the language of the contracts, we decline to read the contracts together.

Turning to the Kingdom's contention that the TSP contract does not fall within the commercial activity exception, we agree. Employees under the TSP contract performed their work in Saudi Arabia and were integrated with the RSAF. Some of these employees provided flight operations services and training to the RSAF. Others trained the pilots in survival skills, including escape and evasion, and ejection over sea, desert, or mountain terrain. Employees also performed maintenance on the F-5 aircraft, minimizing the time the aircraft were unavailable for defense. Unlike a contract to buy army boots or bullets, as the Supreme Court discussed above, the TSP was a contract to provide personnel that were vital to the operation of a national air defense system. While the purpose of the TSP contract was undeniably sovereign, the nature of the contract was also sovereign. The TSP employees were integrated into the RSAF and can be considered military personnel. The legislative history from the FSIA instructs "the employment of diplomatic, civil

service, or military personnel" is not commercial in nature. H.R.REP. NO. 94-1487, at 16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614, *see Kato v. Ishihara,* 360 F.3d 106, 111 (2nd Cir.2004) (holding that employment of a public servant in the promotion of commerce was not in itself a commercial activity), *Holden v. Canadian Consulate,* 92 F.3d 918, 921 (9th Cir.1996) ("Because private parties cannot hire diplomatic, civil service or military personnel, such hiring is necessarily governmental.").

In *Butters v. Vance International, Inc.,* 225 F.3d 462 (4th Cir.2000), the Fourth Circuit was called upon to determine whether the employment of a security guard to protect a head of state constituted a commercial activity under the FSIA. There, the Saudi military did not allow the plaintiff to fill a particular guard position it deemed improper for a female. *Id.* at 464. The Fourth Circuit determined that guarding a head of state is a sovereign act, not one a private party could undertake. *Id.* at 465. "Indeed it is difficult to imagine an act closer to the core of a nation's sovereignty." *Id.* Maintaining an air defense system is a similarly sovereign act. Therefore, the subject matter of the TSP contract does not fall within the commercial activity exception of FSIA and we do not have jurisdiction over Lear's claim for breach of the TSP contract.

With respect to the SPAGE contract, however, we agree with Lear that it falls within the commercial activity exception to the FSIA. A foreign state undertakes commercial activity when it enters the

marketplace and exercises "the same powers that a private citizen might exercise." *Hond. Aircraft Registry, Ltd. v. Gov't of Hond.*, 129 F.3d 543, 548 (11th Cir.1997). As the Supreme Court noted in *Weltover,* the purchase of army boots or bullets is a commercial activity. Here, the Kingdom entered the marketplace to obtain repair services for parts and components for its F-5 aircraft. Under this contract, damaged or defective aircraft parts were shipped from Saudi Arabia to San Antonio, where they were evaluated, repaired, and stored before being shipped back to Saudi Arabia. This is similar to the situation in *McDonnell Douglas Corp. v. Islamic Republic of Iran,* 758 F.2d 341 (8th Cir.1985). There, Iran contracted to buy parts from McDonnell Douglas for its F-4 aircraft. The Eighth Circuit stated that "a contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign immunity does not apply." *Id.* at 349. In determining that the contract to purchase F-4 parts was commercial activity, the Eighth Circuit concluded "that the intent of the purchasing sovereign to use the goods for military purposes does not take the transaction outside of the 'commercial' exception to sovereign immunity." *Id.* We agree. The SPAGE contract for the repair and replacement of goods is a commercial activity, regardless of the product's end use for a military purpose. The SPAGE employees were not integrated with the RSAF, and therefore unlike the personnel working under the TSP contract, they cannot be considered military personnel.

The SPAGE contract is precisely the type of transaction the Supreme Court discussed in *Weltover.* There, it said "that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' . . . a contract to buy army boots or even bullets is a 'commercial' activity." *Weltover,* 504 U.S. at 614, 112 S.Ct. 2160. "[C]ourts typically hold that contracts for procurement of goods and services are commercial rather than governmental in nature." *Walter Fuller Aircraft Sales, Inc. v. Republic of the Phil.,* 965 F.2d 1375, 1384 (5th Cir.1992). In *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, (2nd Cir.1981), the Second Circuit determined that a contract for the sale of cement from American companies to the Nigerian government was a commercial activity. *Id.* at 310. "Its purpose to build roads, army barracks, whatever [with the cement] is irrelevant." *Id.* Regardless of the end use of the F-5 components in aircraft that were used for national defense, the SPAGE contract was for goods and services and is properly construed as commercial activity.

But commercial activity by a sovereign alone is not enough to establish jurisdiction – the activity must also have a direct effect in the United States. "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity." *Weltover,* 504 U.S. at 607, 112 S.Ct. 2160. An effect of a contract is also direct when it is to be primarily performed in the United States. In *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos,* 712

F.Supp. 383 (S.D.N.Y.1989), an American company contracted with an instrumentality of Bolivia for the export of steel tubing and accessories. After partial performance, the Bolivian entity repudiated the contract, and the American company brought suit. *Id.* at 385. The court concluded that where "[t]he performance of the contract was to occur primarily in [the United States], and the foreign defendant utilized United States banking resources to facilitate payment," there is a direct effect for purposes of the commercial activity exception. *Id.* at 390-91. On the other hand, where an American company sued the Federal Republic of Nigeria for the unlawful detention of and damage to its aircraft, the Second Circuit found there was no direct effect in the United States. *Antares Aircraft, L.P. v. Fed. Republic of Nig.*, 999 F.2d 33, 36 (2nd Cir.1993).

> However, in the instant matter, all legally significant acts took place in Nigeria. The aircraft was registered in Nigeria. There is no evidence that the use of the aircraft was related to substantial commerce with the United States. The detention of, and physical damage to, the plane happened in Nigeria. The alleged conversion thus occurred in Nigeria. Moreover, the negotiations over, and the payment of, the outstanding fees occurred in Nigeria and utilized Nigerian currency.

Id. The plaintiff argued that it paid the Nigerian fees from its bank account in New York, but the court

determined this fact was "without legal significance." *Id.*

This court has held that significant financial harm suffered by an American company when a foreign government refuses to remit funds due under a commercial contract is a sufficient direct effect to meet this exception. In *Voest-Alpine Trading Corp. v. Bank of China,* 142 F.3d 887 (5th Cir.1998), this court found that an American company's "nontrivial financial loss in the United States in the form of funds not remitted to its account at a Texas bank" was a direct effect. *Id.* at 896. There, the Bank of China refused to honor a letter of credit that had been posted to pay for a shipment of goods. *Id.* at 890. Similarly in *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.,* 182 F.3d 380 (5th Cir.1999), an American company suffered financial harm after a Honduran public entity allegedly ousted its consultant from a sawmill operating in Honduras in violation of a contract. While the court acknowledged the potential danger in treating the direct effect test expansively, it found the public entity's actions did have a direct effect in the United States as the entity "foresaw and perhaps even helped to plan the financial harms which occurred to appellees." *Id.* at 391.

The SPAGE contract was primarily performed in the United States. The Kingdom shipped parts to Lear in San Antonio, where Lear employees in Texas arranged for their evaluation, repair, and return. The place of payment was Houston, Texas. This is similar

to the situation in *Walpex Trading,* where performance and payment under the contract both occurred in the United States and the contract was therefore considered to have a direct effect in the United States. Lear also suffered financial losses when the LOC was depleted and the Kingdom refused to pay for the repair or storage of the F-5 parts. When the LOC was depleted, Lear already had parts in its San Antonio facility and had repairs outstanding. It suffered additional financial harm when it continued to store (whether properly or not) the parts in its warehouse. Therefore, it is clear to us that the SPAGE contract had a sufficient direct effect in the United States so as to fall within the commercial activity exception of the FSIA.

B. *Forum-Selection Clause*

The Kingdom argues next that the SPAGE contract contains a forum-selection clause that requires this dispute to be heard in Saudi Arabia.[2] Mandatory forum-selection clauses that require all litigation to be conducted in a specified forum are enforceable if their language is clear. *City of New Orleans v. Mun. Admin. Servs., Inc.,* 376 F.3d 501,

[2] The Kingdom argues for the first time on appeal that the law of Saudi Arabia should be applied to interpret the forum-selection clause. Because this argument was not made to the district court, we decline to consider it on appeal. Moreover, the Kingdom cites no Saudi law regarding contract interpretation that is different from United States law.

504 (5th Cir.2004) ("For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive."). The Kingdom argues that the SPAGE contract contains a mandatory forum-selection clause establishing the Board of Grievances (the "Board") in Saudi Arabia as the only forum available to settle disputes. Lear argues that the forum-selection clause is permissive, and the district court agreed with this interpretation. "We review conclusions of law – including contractual interpretations – de novo." *Id.* at 506. The clause in question from the SPAGE contract provides:

> 3.1 Any disputes that may arise from the application or interpretation of any of the provisions of this Contract or from any matter relating to the execution of any work entrusted to the Contractor and not resolved amicably by and between the Government and the Contractor, the Contractor, after being notified of the final decision of the Government regarding the subject under dispute, shall have the right to appeal to the Board of Grievances within thirty (30) days from the receipt of the Government's decision, otherwise it shall be considered as accepting said decision.[3]

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[3] The contract goes on:

3.2 The Contractor may not, because of such dispute, suspend work or any part thereof including the

(Continued on following page)

Lear argues that this language does not clearly demonstrate the parties' intent to bind themselves to Saudi Arabia as the only available forum. Instead, it argues that the clause is permissive and allows jurisdiction to be exercised in Saudi Arabia, but does not rule out other possible forums. Assuming without deciding that the provision here is sufficiently clear to be mandatory, it is only applicable in situations where the Kingdom has issued a final decision. The Kingdom did not render a final decision on the issues of final payment and close out of the SPAGE contract. Lear contacted the Kingdom by letter in 2002 informing the Kingdom that the F-5 parts being stored could not be turned over until the contract was properly terminated as per instructions from the United States Air Force. The Kingdom did not

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disputed part and it is always required to perform all work according to the Government's instructions until settlement of the dispute or the issue of a final decision by the Board of Grievances which shall be final and binding on the two parties.

3.3 The Contractor shall maintain full knowledge of the provisions of the Saudi Arabian Government Procurement Law and its executive by-law instructions which shall be applied to this Contract and its documents. These provisions are considered to take precedence whenever a contradiction occurs or when not specified, or if there is a contradiction between the implementation of the rules and the texts of the Contract and its documents. Ambiguity or confusion in the contract and its documents will be interpreted according to the terms of the law and implementation regulations.

respond to this letter and now argues that its lack of response should be construed as a final decision. It did not make this argument to Lear prior to this litigation, and Lear received no notice or indication that the Kingdom's silence constituted a final decision that triggered the thirty day appeal period. With no final decision of the Kingdom, the Board never became available as a forum. Moreover, if we accept the Kingdom's argument that the Board is the exclusive forum to resolve this dispute, Lear would be denied a remedy because the remedy the Kingdom points to in the SPAGE contract was never triggered.

C. *Forum Non Conveniens*

The district court also denied the Kingdom's motion to dismiss the case on the basis of forum non conveniens. We review this ruling for an abuse of discretion. *DTEX, LLC,* 508 F.3d at 787. In order for a case to be dismissed for forum non conveniens, there must be another forum that could hear the case, and therefore the first step in evaluating the motion is to "determine whether there exists an alternate forum." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). This determination turns on the availability and adequacy of the forum:

> A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly,

> even though they may not enjoy the same benefits as they might receive in an American court.

In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1165 (5th Cir.1987) (*en banc*) (citations omitted), *vacated on other grounds sub nom., Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989), *reinstated except as to damages by In re Air Crash Disaster Near New Orleans, La.*, 883 F.2d 17 (5th Cir.1989) (en banc).

The district court found that the Board was an available and adequate forum. Lear did not dispute that the Board was an available forum, and the district court focused its analysis on whether it was adequate. The district court had concerns regarding the fairness of the Board. Experts from both parties agreed that the Board does not give full weight to testimony given by women and non-Muslims, and considers testimony of Saudi nationals to be more credible than non-nationals. Despite these concerns, the district court did not find that the Board was an inadequate forum, and proceeded to the next step of the forum non conveniens analysis.

The district court determined that the private and public interest factors weighed in favor of Texas as a forum.

> The factors pertaining to the private interests of the litigants included the "relative ease of access to sources of proof; availability of compulsory process for attendance of

> unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." [*Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)].

Piper Aircraft, 454 U.S. at 241 n. 6, 102 S.Ct. 252. The district court determined that witnesses were located in both forums, and that translation of documents was unavoidable, regardless of forum. It also noted that many of the Kingdom's witnesses were fluent in English, while Lear's witnesses were not fluent in Arabic, making the United States a preferable forum. The district court acknowledged that Lear's choice of forum was due some degree of deference. *See Gilbert,* 330 U.S. at 508, 67 S.Ct. 839 ("Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.") In viewing these factors as a whole, the district court concluded that they weighed in favor of Texas as the forum.

The district court next considered the public interest factors.

> The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the

> avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. [*Gilbert,* 330 U.S. at 509, 67 S.Ct. 839].

Piper Aircraft, 454 U.S. at 241 n. 6, 102 S.Ct. 252. The district court acknowledged that neither forum was ideal for both parties and that some inconvenience was unavoidable. It also acknowledged that while both countries had an interest in trying the case, the United States, and Texas in particular, had a stronger interest.

We find no abuse of discretion in the district court's reasoning and conclusions, particularly with regard to the controversy regarding the SPAGE contract which is all that remains. The majority of activity under that contract took place in San Antonio, where the parts were evaluated and repaired by Lear employees, and continue to be stored there. The activity in Saudi Arabia was limited to Lear technicians employed under the TSP contract who removed the parts in need of repair and prepared them to ship.

The application of foreign law is another factor to consider, and while it has not yet been determined whether Saudi or American law is to apply to this dispute, the district court noted that federal courts have ably applied Saudi law in other cases. Based on these determinations, the district court concluded that the public interest factors weigh in favor of Texas as a more convenient forum.

The district court applied the proper law in evaluating the Kingdom's motion to dismiss for forum non conveniens. It first determined that Saudi Arabia was an available and adequate forum, and then weighed the private and public interest factors and concluded that Texas was an appropriate forum.

> The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Piper Aircraft, 454 U.S at 257, 102 S.Ct. 252. Here, the district court considered the relevant factors and acknowledged the difficulties presented by both possible forums. The focus of the analysis is on convenience, and the district court did not abuse its discretion in determining that Texas was a more convenient forum. *See Dickson Marine, Inc. v. Panalpina, Inc.,* 179 F.3d 331, 342 (5th Cir.1999).

III. *Conclusion*

For the reasons set forth above, the district court erred in refusing to grant the Kingdom's motion to dismiss Lear's claims under the TSP contract. This makes it unnecessary for us to consider the Kingdom's act of state argument which relates to Lear's failure to furnish the tax certificates and Lear's claims for additional housing expenses caused by

orders of the royal family. With regard to the claims related to breach of the SPAGE contract, the commercial nature of the contract and the direct effect of the contract in the United States bring it within the FSIA's commercial activity exception. The district court therefore correctly denied the motion to dismiss Lear's claims under the FSIA with regard to this contract. The grievance procedure outlined by the SPAGE contract was never triggered and did not become available to Lear so the district court correctly denied the Kingdom's motion to dismiss based on the forum-selection clause. The SPAGE contract's considerable connection with Texas and its continuing effects in that state, along with the other private and public interest factors demonstrate that Texas is an appropriate forum, and the district court did not abuse its discretion in denying the Kingdom's motion to dismiss based on forum non conveniens.

We therefore AFFIRM the denial of the Kingdom's motions to dismiss Lear's claims with respect to the SPAGE contract. However, we REVERSE the district court's order denying the Kingdom's motion to dismiss Lear's claims under the TSP contract. We REMAND this case to the district court for further proceedings consistent with this opinion.

AFFIRMED in part.

REVERSED in part and

REMANDED.

2008 WL 2946059

United States District Court,
W.D. Texas,
San Antonio Division.
UNC LEAR SERVICES, INC., et al., Plaintiffs,
v.
KINGDOM OF SAUDI ARABIA, et al., Defendants.
No. SA-04-CA-1008-WRF.

July 25, 2008.

Charles Walter Schwartz, Noelle M. Reed, Wallis M. Hampton, Skadden, Arps, Slate, Meagher & Flom, LLP, Houston, TX, Daniel J. Macaluso, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, Jeffrey H. Dasteel, Robert J. Herrington, Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, CA, for Plaintiffs.

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ORDER DENYING MOTION TO DISMISS

FURGESON, J.

BEFORE THE COURT are Defendants Kingdom of Saudi Arabia and Ministry of Defense and Aviation's (collectively the "Kingdom") Motion to Dismiss (Docket No. 101), filed April 13, 2007, Plaintiff UNC Lear's ("LSI") Response (Docket No.

110), filed June 4, 2007, and the Kingdom's Reply (Docket No. 116), filed June 29, 2007. The Court held a hearing on this matter on September 26, 2007, and has received supplemental briefing from the parties since the hearing. After careful consideration of the briefs, arguments made in open court, and the applicable law, the Court is of the opinion that the Motion to Dismiss (Docket No. 101) should be DENIED.

I. Introduction

This case is about a private American company (LSI) that entered into two interrelated commercial contracts with the Kingdom, and as a result has suffered losses directly felt in the United States.[1] LSI filed the instant suit after its initial efforts to resolve the underlying dispute became frustrated, and the Kingdom's actions made the prospect of suing the Kingdom in its own venue appear tendentious. Since this case's inception nearly four years ago, LSI's efforts to engage the judicial process have been stymied due to the Kingdom's initial reluctance to actively engage in the resolution of this dispute.

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[1] It is important to note that LSI has acquired and now operates all of UNC's business, and for the purpose of this Order, the Court defines the plaintiff to be LSI. Additionally, because the Ministry of Defense and Aviation of the Kingdom of Saudi Arabia is an instrumentality of the state, both defendants are referred to collectively as the "Kingdom" for the purposes of this Order.

The Kingdom has moved to dismiss based on the Foreign Sovereign Immunities Act ("FSIA") and *forum non conveniens*. First, the Court finds that jurisdiction is proper under the FSIA because the Kingdom's acts fall under the commercial activities exception. The Kingdom acted as a private market participant and engaged in commercial activity that had direct immediate consequences in the United States. Second, the Court finds that the case should not be dismissed based on *forum non conveniens*. Although there is some concern about the prospects of a fair trial for LSI in Saudi Arabia, given the nature of the case and the potential influence the Kingdom has over the Saudi Arabian Board of Grievances (the "Saudi Board"), this does not render the Saudi Board an inadequate forum. Nevertheless, after examining the private and public interest factors, the Court does not find that the balance warrants stripping LSI of its forum choice. While it is true that this litigation will cause some inconvenience for both parties, regardless of what forum adjudicates the case, the facts do not favor dismissal. Furthermore, the Kingdom has failed to establish that LSI's forum choice is oppressive or vexatious, or that administrative constraints warrant dismissal. There is not a strong showing that the alternate forum, when weighed against LSI's forum choice, is significantly more convenient and will better serve justice.[2]

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[2] Both parties in this case provide extensive briefing, evidentiary exhibits, and case law to support their respective

(Continued on following page)

II. Factual History

SPAGE and TSP Contracts

The Kingdom has maintained as part of its air defense systems a fleet of Northrop-Grumman F-5 aircraft purchased from the United States under the Peace Hawk Foreign Military Sales program.[3] *Compl.* at 4, ¶¶ 9, 12-13. Under a Foreign Military Sales Agreement ("FMSA"), the Kingdom contracted *directly* with the United States government to provide maintenance, repair, and services for its F-5 fleet. In return, the United States retained American companies to provide the required service. *Response* at 4. During the late 1980's and early 1990's, LSI became the primary contractor that repaired and maintained the Kingdom's F-5 aircraft under various FMSAs. *Compl.* at 4, ¶ 13.

Foreign countries often decide it is in their best interest to forego the government-sponsored FMSA arrangement in favor of a private commercial relationship. In the mid-1990s, the Kingdom terminated

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positions. Out of an interest of judicial economy, the Court will not address every point and counter-point, or every case and counter case. Nevertheless, the Court has fully reviewed the record. A failure to address a particular line of arguments or cases should not be construed as an unintentional omission or an inference that the Court did not consider the issue.

[3] Because the Ministry of Defense and Aviation of the Kingdom of Saudi Arabia ("MODA") is an instrumentality of the state, for the purposes of this Order, both Defendants will be referred to collectively as the "Kingdom" unless otherwise noted.

one of the FMSAs with LSI that dealt with repairs and pursued a direct commercial relationship with private contractors. *Response* at 5. The Kingdom sent LSI an invitation to bid on the private contract for the repair and maintenance of the F-5 fleet and ultimately selected LSI for the repair contract. *Compl.* at 5, ¶¶ 14, 15. Thus, on January 10, 1995, LSI entered into a contract with the Kingdom called the "F-5 Spare Parts and Ground Equipment" contract (the "SPAGE contract"). *Id.* at ¶ 15. Concurrently, LSI performed repairs under both the private SPAGE contract and maintenance services under an existing FMSA. *Id.* at ¶¶ 15, 16.

Under the SPAGE contract, the Royal Saudi Air Force (the "RSAF") shipped broken F-5 parts to LSI's San Antonio office, which then inventoried each part, identified potential vendors to inspect and repair the part, solicited bids from the vendors, and made recommendations to the RSAF on whether the part should be repaired, and if so, by whom. *Compl.* ¶ *15*; *App. 4-5*; *Pl.'s Response* at 6. If the suggested repair was approved by the RSAF, LSI coordinated the repair and return to Saudi Arabia. *Compl.* ¶ 15; *App.* 2-3; *Response* at 6.

Similarly, when the FMSA contract through which LSI provided maintenance services was near expiration, the Kingdom again decided to forgo the government-run contract and instead contract directly with a private commercial actor. *Compl.* ¶ 15; *Response* at 5. After another bidding contest, the Kingdom awarded LSI the "F-5 Technical Support

Program" contract ("TSP contract"). *Compl.* ¶ 16; *Response* at 6. The TSP contract became effective on October 1, 1996.[4] *Id.*

Under the TSP contract, LSI recruited technically-qualified personnel in the United States and exported their services to Saudi Arabia to assist the RSAF in various matters including maintenance and support of the F-5 fleet. *Compl.* ¶ 19; *Response* at 5. Although the TSP was a private contract between the Kingdom and LSI, it required the approval of the U.S. Department of State because it involved the transfer of military and technical information. *Compl.* ¶ 20; *Response* at 5-6. The parties obtained approval from the Department of State through a technical assistance agreement, which required the Kingdom to agree that the parties' relationship was "subject to all United States laws and regulations relating to exports and to all administrative acts of the U.S. Government pursuant to such laws and regulations." *Id.*

At this point, the Kingdom had entered into interrelated contracts with LSI, for both the repair and maintenance of the F-5 fleet. *Id.*[5] Both the

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[4] LSI clarifies that contrary to the Kingdom's position that the TSP contract took effect on November 1, 1996, the TSP contract actually became effective on October 1, 1996. *Response* at 6, n. 3.

[5] In sum, LSI initially provided repair and maintenance under separate FMSAs. Then, LSI provided repair through the private SPAGE contract and maintenance services through an

(Continued on following page)

SPAGE contract and TSP contract served to keep the F-5 fleet aircraft worthy. *Response* at 7. Essentially, LSI employees (working under the TSP contract) in Saudi Arabia ("TSP employees") handled the parts that needed to be repaired and sent those parts to LSI employees (working under the SPAGE contract) in San Antonio ("SPAGE employees") to be assessed and fixed. *Compl.* ¶ 21. When the identified parts were repaired, LSI SPAGE employees sent the parts back to Saudi Arabia where LSI TSP employees reinstalled the parts. *Id.* The two contracts were a coordinated effort by LSI to maintain the integrity of the Kingdom's F-5 program and required daily collaboration between SPAGE and TSP contract employees. *Response* at 7.

Both LSI contracts were funded and supported in the United States. *Id.* Additionally, LSI oversaw both the TSP and SPAGE contracts and handled administrative matters in its offices in the United States. Under the TSP contract, office invoices and all employee salaries were managed and paid from LSI's Annapolis office. *Id.* at 7-8. LSI's Annapolis office wire-transferred funds to the Saudia-American Bank in Riyadh. Likewise, all SPAGE invoices and salaries were paid and managed in the United States. Because these two contracts were closely tied to the United States, both referenced U.S. law and

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FMSA. Ultimately, LSI provided repair through the private SPAGE contract and maintenance services through the private TSP contract.

regulations in developing standards and qualifications for employees and procedures. *Id.* at 9.

The Letter of Credit and the SPAGE Contract

Under the SPAGE contract, the Kingdom was required to open and maintain an irrevocable letter of credit to fund LSI's repair work. *Compl.* ¶ 28. The Kingdom had to ensure the letter of credit had sufficient funds to cover materials undelivered at the end of the contract. *Id.* Furthermore, the contract states the Kingdom "shall extend the Letter of Credit until final Contract closure." *Id.*

Thus, the SPAGE contract was a cost-plus contract that required LSI to front the repair costs. *Response* at 8. When a vendor finished repairing an approved part, the vendor invoiced LSI for the repair work. *Id.* LSI paid the vendor and submitted an invoice to the Kingdom, which included the vendor's charges. *Id.* Once the Kingdom approved the invoice, LSI could draw payment from the letter of credit established by the Kingdom at the Riyadh Bank in Houston, Texas. *Id.* If the Kingdom did not approve the invoice, LSI felt the economic loss because it prepaid the vendor. *Id.*

The letter of credit became depleted in late 1998. *Response* at 12. Nevertheless, the RSAF (the Kingdom) continued to ship several hundred parts to LSI's San Antonio facility. *Id.* LSI inspected the parts and prepared repair quotes, however, the RSAF did not approve or fund the quoted repairs. *Id.* LSI repeatedly

brought this issue to the RSAF's attention, and subsequently the parties held multi-day meetings to discuss the SPAGE contract. *Id.* As a result of the meetings, the parties agreed to free up portions of the letter of credit to fund critical orders by canceling other repair orders. *Id.* at 12.

Additionally, LSI agreed to send certain parts back to Saudi Arabia, and at the RSAF's request, to hold on to other parts while the RSAF attempted to obtain additional funding. *Id.* at 12-13. LSI complied and in February 1999, the RSAF added over $2.5 million additional funds to the letter of credit. *Id.* The additional funding helped alleviate the backlog of parts; however, as of May 1999 – when the SPAGE contract was set to expire – many of the parts for which the RSAF did not provide instructions were still stored in LSI's San Antonio warehouse.[6] *Id.* 13. Despite the fact that the RSAF had extended the letter of credit on several occasions, by 2000 the Kingdom had not provided instructions regarding the San Antonio warehouse parts. *Id.* On March 7, 2000, LSI wrote to the Kingdom asking for additional funding to repair the stored parts. *Id.* According to LSI, the Kingdom delayed payment and instructions while it decided what to do with the SPAGE contract. *Id.*

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[6] In July 1999, LSI submitted its bid for the follow-on contract; however, in early 2000 the Kingdom cancelled the bidding process. The Kingdom asked for new bids in September and LSI's bid-submitted in January 2001-was the low bid. *Compl.* ¶ 26. Nevertheless, LSI did not receive the contract. *Id.* at ¶ 27.

Additionally, LSI informed the Kingdom on multiple occasions that the Kingdom was incurring storage fees. *Id.*

In September 2002, the United States Air Force ("USAF") informed LSI that the Kingdom wanted the parts in LSI's San Antonio facilities transferred to a different FMSA contract. *Id.* In order for this to occur, the USAF advised that the SPAGE contract needed to be modified and closed out to properly provide for the transfer of parts. *Id.* The USAF advised the Kingdom that the RSAF and LSI needed to reach a new agreement regarding the termination of the SPAGE contract and the remaining parts in San Antonio. *Id.* On November 6, 2002, LSI sent a similar letter to the Kingdom. *Id.* The Kingdom did not respond. *Id.* After another letter requesting a response and payment, the Kingdom unilaterally terminated the letter of credit in August 2003. *Compl.* ¶¶ 29, 70. Subsequent trips by LSI to Saudi Arabia failed to resolve the matter. *Response* at 14. The Kingdom continued to request additional miscellaneous information from LSI and yet failed to respond to LSI's inquires or requests. *Id.*[7]

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[7] Additionally, there is an issue with the Kingdom repeatedly renewing LSI's $1.2 million performance bond under the SPAGE contract without explanation. *Response* at 15; *Compl.* ¶ 31.

Housing in Saudi Arabia

Under the prior FMSA contract for maintenance services, LSI occupied the "Al Bilad" housing compound in Al Khobar, Saudi Arabia. *Compl.* ¶ 39. This compound was overpriced, in poor condition, had run-down equipment, and the landlord failed to properly maintain the facilities. *Id.* at ¶¶ 39, 41. When LSI initially submitted its bid for the TSP contract – which included estimated costs for housing personnel – LSI used housing estimates based on two different compounds. *Response* at 10. Under the TSP contract LSI could determine where to house its personnel. *Compl.* ¶ 40.

LSI located two suitable housing compounds – the Khaloud Village and the Thompson Village. *Compl.* ¶ 42. The effective date of the new TSP contract was October 1, 1996. In September 1996 and October 1996, LSI prepared to move its personnel to another housing compound. *Response* at 10. LSI gave proper notice to the Al Bilad landlord that it would not renew its lease, signed leases and placed deposits on the other two new compounds, hired movers and moved most of its personnel and equipment by September 30, 1996. *Compl.* ¶¶ 42, 43; *Response* at 10.

The Kingdom did not allow the move. *Compl.* ¶ 45. The Al Bilad landlord contacted Prince Turki Bin Nasser Bin Abdulaziz ("Prince Turki"), the Director of Operations and Deputy Commander of the RSAF, and informed Prince Turki that LSI was

leaving the Al Bilad compound at the end of the lease. *Id.* at ¶ 44. Subsequently, Prince Turki, acting on behalf of the Kingdom, ordered LSI to return to the compound. *Id.* at ¶ 45. On October 1, 1996, the first day of the new TSP contract, Prince Turki's staff informed LSI that if it did not remain at Al Bilad it risked losing the TSP contract. *Response* at 10.

The following day, LSI met with Prince Turki and the Al Bilad landlord and explained that the rent was exorbitantly high – in relation to its bid calculations – and that staying at Al Bilad would cause LSI serious financial hardship. *Compl.* ¶ 46. Prince Turki informed LSI that he communicated to the landlord that it would be appropriate for LSI to pay a rental price within LSI's budget. *Id.* The landlord rejected the suggestion and refused to negotiate. *Id.* Prince Turki stood by his order and required LSI to remain at Al Bilad. *Id.* at ¶ 47.

LSI complied with the order and moved back into the Al Bilad compound. *Id.* Prince Turki, on behalf of the Kingdom, agreed to compensate LSI for any additional costs incurred from having to move back and occupy the Al Bilad compound. *Id.* While at Al Bilad, LSI was forced to pay for services that it alleges should have been paid by the landlord. *Response* at 11. LSI paid for these services from its accounts in the United States. *Id.* Additionally, the Al Bilad landlord refused to lease to another lessee significant empty space at the compound that LSI did not use or need while carrying out the TSP contract. *Compl.* ¶ 48. Thus, LSI was forced to pay for use of

the entire compound, even though it only used part of it.

LSI and Prince Turki corresponded multiple times regarding the housing issue. *Id.* at ¶ 49; *Compl.* at 11. LSI wrote multiple letters to Prince Turki explaining that being forced to remain at Al Bilad caused LSI substantial losses, the expense significantly exceeded LSI's original budget, and it needed to be compensated for this additional contract requirement imposed by the Kingdom. *Response* at 11. In subsequent correspondence, Prince Turki noted that LSI was asked to remain at the compound while the RSAF "negotiated a payment method with the landlord that would allow [LSI] to remain at Al Bilad." *Response* at 11.

Furthermore, Prince Turki stated that "[p]ayment methods agreeable to the landlord that allow his compound to remain fully occupied are still being worked out." *Id.* During meetings chaired by Prince Turki, the Prince recommended LSI pay $2.4 million for its partial use of the compound and the landlord refused. *Compl.* ¶ 49. Consequently, the landlord filed a $16 million law suit against LSI and obtained a $7.8 million judgment based on the full rental value. *Response* at 11. LSI did not occupy all of Al Bilad and LSI alleges that the $7.8 million judgment is well beyond the expenses that LSI would have incurred at the other two compounds. *Id.* LSI was also forced to incur an additional expense for an unreturned, unrelated bid bond, discussed below, and felt the repercussions of this expense in the United States. *Id.*

Breach of Performance Bonds

Earlier, in June 2000, the Kingdom invited LSI to bid on a contract for the Royal Saudi Naval Forces and required LSI to submit an $826,000 bid bond that was to last for no more than six months. *Response* at 15; *Compl.* ¶ *65.* LSI did not receive the contract; however, the Kingdom continued to renew the bond at LSI's expense and will not release it until the tax issue regarding the TSP contract is resolved. *Id.*; *Compl.* ¶¶ 65-68.

Both the SPAGE and TSP contracts required LSI to submit performance bonds to protect the Kingdom if LSI defaulted. *Response* at 9-10. LSI paid a $5.6 million performance bond on the TSP contract. *Response* at 11. Additionally, the TSP contract allowed the Kingdom to withhold paying the final set of invoices totaling ten percent until certain certificates were provided. *Id.* at 10. During November 2000, as the TSP contract was winding up, LSI asked the Kingdom to release the $5.6 million performance bond and help prepare the paperwork necessary to close out the contract and pay the receivables. *Id.* at 11-12. Outstanding receivables totaled $12.2 million. *Id.* at 11. At that point, the Kingdom denied the request and informed LSI it needed to first submit tax certificates. *Id.* at 12. Ultimately, LSI hired an accounting firm to examine the financial records to sufficiently answer the Kingdom's revenue-based questions. *Id.* LSI discovered the Kingdom had misreported LSI's revenue to the Kingdom's taxing authority by providing the total value of the contract

– rather than the amount actually paid. *Id.* 12. LSI submitted corrected information and also submitted a bond to the Saudi taxing authority to secure the full amount of the claimed tax liability. *Id.* To date, the Kingdom has not yet payed the outstanding receivables nor released the unrelated $5.6 million performance bond. *Compl.* ¶ 55.

Judicial Freeze

LSI met with the Kingdom in Saudi Arabia in 2003 and 2004 in an attempt to obtain compensation for monies owed. *Response* at 14. During this time, LSI learned the Kingdom shared confidential material with the Al Bilad landlord regarding the $12.2 million outstanding receivables.[8] *Id.* According to the Kingdom, the Al Bilad landlord obtained a prejudgment freeze on LSI's receivables. *Id.* LSI was denied proof of the alleged freeze and to date has no verification that it actually exists. *Id.* Shortly thereafter, in mid-2004, the Kingdom demanded that the Saudi bank holding LSI's TSP performance bond pay the Kingdom the entire $5.6 million. *Id.*; *Compl.* ¶¶ 81-82.

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[8] Section 17 of the General Provisions of the TSP contract requires all "[c]ontract document data" be "protected and safeguarded against disclosure to any unauthorized person or party." LSI contends that releasing information regarding the $12.2 million receivables that resulted in the alleged "freeze" was in breach of section 17.

Basis of the Litigation

As previously mentioned, this case centers around a contract dispute involving two interrelated contracts. Specifically, LSI contends it has successfully completed performance under both contracts, however, the Kingdom has (1) refused to process the necessary contract close-out paperwork; (2) refused to release a $5.6 million contract performance bond held by a Saudi bank; (3) refused to respond to LSI's request for compensation for costs and expenses it was forced to incur at the Kingdom's request during the contract performance; and (4) submitted erroneous paperwork to taxing authorities that has allowed the Kingdom to unlawfully retain more than $12.2 million in contract completion payments to LSI.

The Kingdom moves to dismiss on several grounds: (1) there is no jurisdiction because the case involves the sovereign affairs of the Kingdom and requires the Court to review acts of State by the Kingdom; (2) there is no nexus to the Western District of Texas or the United States; (3) the contracts are governed by Saudi law; and (4) the Complaint should be dismissed because Saudi Arabia is the more appropriate forum.[9]

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[9] Additionally, the Kingdom asks this Court to once again take up the issue of whether this case involves a valid forum selection clause. This Court resolved that issue two years ago (Docket No. 14) in its Order Denying Kingdom's Motion to Dismiss. Eight months later, this Court denied the Kingdom's request to reconsider that decision (Docket No. 48) and informed

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The two issues at the heart of Defendants' Motion to Dismiss are (1) whether jurisdiction is proper in this Court under the FSIA; and (2) whether this case should be dismissed based on *forum non conveniens*. For the reasons stated below, the Court finds that jurisdiction is proper under the FSIA[10] and that *forum non conveniens* does not warra dismissal of this case.

III. Discussion

A. Foreign Sovereign Immunities Act

(1) The Legal Standard

The FSIA provides the sole basis for federal courts to have subject matter jurisdiction over a foreign sovereign. *Permanent Mission of India to the*

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the Kingdom it could assert that argument only with leave of the Court. The Kingdom has not moved for leave and the Court will not consider the forum selection clause issue in this Order.

[10] The Court chooses to address the jurisdictional issue first. Although the Supreme Court stated that a court "*may* dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter jurisdiction and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant," it is not mandatory. *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, ___ U.S. ___, ___, 127 S.Ct. 1184, 1186, 167 L.Ed.2d 15 (2007) (emphasis added). *Sinochem* clarifies that threshold issues such as subject-matter and personal jurisdiction may be decided in any order that the court deems appropriate. Since *forum non conveniens* considerations do not weigh heavily in favor of dismissal, the Court will first determine if jurisdiction is appropriate.

United Nations v. City of New York, ___ U.S. ___, 127 S.Ct. 2352, 2355, 168 L.Ed.2d 85, (2007) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989)). Foreign sovereigns have enjoyed almost complete immunity from suit since this country's inception; however, in 1952 the "State Department adopted a more 'restrictive theory of foreign sovereign immunity.'" *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 991 (10th Cir.2007) (citing *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 428, 486-87 (1962)). This restrictive theory was codified when Congress enacted the FSIA in 1976. *Bank of China*, 506 F.3d at 991; *Permanent Mission of India*, ___ U.S. ___, 127 S.Ct. at 2357, 168 L.Ed.2d 85. Although foreign sovereigns are still entitled to immunity for public or sovereign acts, unqualified immunity no longer exists for private and commercial activity. *Id.*; *see also Austria v. Altmann*, 541 U.S. 677, 688-89, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004); *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). Unless a specific exception applies, a foreign state is presumptively immune from suit under the FSIA. 28 U.S.C. § 1604; *Nelson*, 507 U.S. at 355.

"These exceptions are central to the Act's functioning: 'At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions applies' as 'subject-matter jurisdiction in any such action depends on that application." *Altman*, 541 U.S. at 691 (quoting *Verdinden*, 641 U.S. at 493-94.). When

determining whether immunity applies, the court employs a burden-shifting analysis. *Byrd v. Corporation Forestaly Industrial de Olancho, S.A.,* 182 F.3d 380, 388 (5th Cir.1999). "The defendant must first establish a prima facie case that it is a sovereign state, creating a rebuttable presumption of immunity." *Bank of China,* 506 F.3d at 991; *Byrd,* 182 F.3d at 388. Once the *prima facie* case of immunity is established, the burden of production shifts to the plaintiff to show that an FSIA exception applies. *Byrd,* 182 F.3d at 388. If the plaintiff makes such a showing, the foreign sovereign claiming FSIA immunity "retains the ultimate burden of persuasion throughout." *Id.*

(2) The FSIA's Commercial Activity Exception

In the present case, LSI does not dispute the Kingdom's status as a "foreign state" or "agency or instrumentality" of a foreign state. *Response,* at 16. Therefore, the Kingdom has made a *prima facie* showing of immunity. *See Byrd,* 182 F.3d at 388. However, LSI asserts that an exception applies, which vests the United States courts with subject matter jurisdiction over this case. The exception at issue in this case is the commercial activity exception. 28 U.S.C. § 1605(a)(2). The FSIA's commercial activity exception is the "most significant . . . exception[ ]" to immunity. *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). "It is 'at the heart' of the FSIA's codification of

the restrictive theory of foreign sovereign immunity." *Bank of China,* 506 F.3d at 992; (citing Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One,* 5 CHINA J. INT'L L. 675, 682 (winter 2005)); *see also Weltover,* 504 U.S. at 612-13.

The FSIA's "commercial activity exception . . . provides subject matter jurisdiction" when a "plaintiff's claim has a sufficient connection, or more precisely a 'jurisdictional nexus' to the United States." *Byrd,* 182 F.3d at 389 (citing *Stena Rederi AB v. Commision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.,* 923 F.2d 380, 386 (5th Cir.1991)); *see also Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 890 (5th Cir.1998). There are three types of acts listed in the FSIA's commercial activities exception that identify a sufficient connection necessary to satisfy the jurisdictional nexus requirement. *Voest-Alpine,* 142 F.3d at 892. The commercial activity exception provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> . . .
>
> in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; [3] or upon an act outside

> the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (bracket numbering added). In the present case, LSI asserts that the district court has subject matter jurisdiction over its claims against the Kingdom because the Kingdom's acts were (1) commercial, and (2) those acts had a direct effect in the United States. Thus, LSI contends that there is a sufficient jurisdictional nexus to the United States under the commercial activity exception. The Court agrees.

This Court has jurisdiction under the FSIA because LSI's claims are based on commercial conduct and the Kingdom's acts had a direct effect in the United States. *Weltover,* 504 U.S. at 614-15; *Walter Fuller Aircraft Sales, Inc., v. Republic of Phil.,* 965 F.2d 1375, 1384 (5th Cir.1992); *Byrd,* 182 F.3d at 390-91; *Strata Heights Int'l Corp. v. Petroleo Brasileiro, S.A.,* 2003 WL 21145663, at *3-4 (5th Cir. Apr.28, 2003). Once the Kingdom forwent the FMSA contract and decided to enter into direct commercial contracts with LSI, it became amendable to suit under the FSIA. Furthermore, when the Kingdom elected to forgo the FMSA military contract and contract directly with the American-based LSI, it had to know that any breach would have a direct impact on LSI in the United States, and that it would thus be amenable to suit here. *Id.* Accordingly, the Kingdom's

commercial acts are not shrouded with immunity and LSI's claims are properly before this Court. *Id.*

a. The Kingdom Engaged in a Commercial Activity

Because the Kingdom acted as a private market participant and not as a regulator of a market, its acts were commercial in nature under the FSIA. *Weltover,* 504 U.S. at 607. LSI correctly argues that the record, including the Kingdom's own admissions, establishes that the Kingdom's conduct in connection with the TSP and SPAGE contracts was commercial in nature and satisfies the first prong of the commercial activities exception.[11] *Response,* at 17, 24.

The FSIA states as follows:

> A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

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[11] The record contains multiple instances where the Kingdom refers to the TSP and SPAGE contract as "commercial."

28 U.S.C. § 1603(d). The Supreme Court announced its rule for determining whether an activity is commercial in *Weltover.*[12] The Supreme Court stated:

> [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce," *Black's Law Dictionary* 270 (6th ed.1990).

504 U.S. at 614 (emphasis in original). A foreign sovereign is "commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market." *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras,* 129 F.3d 543, 548 (11th Cir.1997).

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[12] For a detailed historical development of sovereign immunity in the United States, see *Guevara v. Republic of Peru,* 468 F.3d 1289, 1295 (11th Cir.2006).

The Supreme Court further explained that "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Weltover,* 504 U.S. at 614-15.

The Supreme Court's analysis in *Weltover* provides guidance, as the Kingdom's argument is similar to the one made by the defendant's in *Weltover.* In *Weltover,* Argentina contended that "although the FSIA bars consideration of 'purpose,' a court must nonetheless fully consider the *context* of a transaction in order to determine whether it is 'commercial.'" 504 U.S. at 615. The Supreme Court stated that "this line of argument is squarely foreclosed by the language of the FSIA." *Id.* at 617. The Court continued that "[h]owever difficult it may be in some cases to separate 'purpose' (*i.e.,* the *reason* why the foreign state engages in the activity) from 'nature' (*i.e.,* the outward form of the conduct that the foreign state performs or agrees to perform) . . . the statute unmistakably commands that to be done. . . ." *Id.* In concluding that Argentina's activity constituted "commercial activity" under the FSIA, the Court concluded that it was irrelevant *why* Argentina participated in the manner of a private actor; all that mattered was that it had participated as such. *Id.*

In the present case the Kingdom asserts that its immunity should be saved because the contracts and activities with LSI related to "intrinsically sovereign" activities for the Saudi military. (The purpose of the activities was to keep its Saudi air force's F-5's aircraft worthy.) Furthermore, the Kingdom states that LSI's employees were "so enmeshed in the daily activities and operations of national security" that the underlying acts were sovereign. *Reply* at 6.

Essentially, the Kingdom argues that since sovereigns, and not private actors, have an air force, the contracting for repair, services, and technical expertise in furtherance of that air force is intrinsically sovereign and not what private companies do – because private companies do not have an "air force." Thus, the Kingdom emphasizes the *purpose* of the contract. This context-based approach was rejected in *Weltover*. 504 U.S. at 617.

The question before this Court is whether the activity in question is authoritative in nature such that it could not be exercised by a private party, or whether, like a contract to buy army boots, it is one that private companies can similarly engage in. Thus, this Court is concerned with the *nature* of the contract. Could a private company similarly engage in a contract for services – to train, repair, and consult – or is the act inherently sovereign in nature? Did it involve the "*type* of actions by which a private party engages in 'trade and traffic or commerce,'" or one that only a sovereign could engage in? *Id.* at 615 (emphasis added).

While the Kingdom cautions about the consequences of looking at the underlying contracts from a from a level of generality that renders every State act commercial, the contracts must be analyzed at some level of generality; otherwise every State act will be declared inherently sovereign, and consequently presumptively immune. Although the line between commercial and non-commercial is not clearly demarcated, courts have been instructive when determining whether a contract is commercial in nature. Just as a private party can contract for services with regard to the maintenance, training, and repair of a luxury G-5 aircraft, the Kingdom similarly "ventured into the marketplace to find the expertise and resources" to contract for services in regard to its F-5 aircraft. *Honduras,* 129 F.3d at 547. To contract for services is commercial in nature, and "the type negotiable among private parties."[13] *Id.*

To determine if an activity is commercial in nature, whether it is a contract for goods or services, courts look to whether the activity is one that a

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[13] "A state not acting in its unique role as a sovereign is akin to a private citizen or merchant." *Republic of Guevara,* 468 F.3d at 1296; *see Bank of the United States v. Planters' Bank of Ga.*, 9 Wheat. 904, 22 U.S. 904, 907, 6 L.Ed. 244 (1824) (" . . . when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.").

private actor engages in. *Honduras,* F.3d at 548 (characterizing a contract for services relating to regulating aircraft in Honduras as one designed to "provide goods and services"); *Walter Fuller,* 965 F.2d at 1384. Here, it is clear that the Kingdom elected to enter into commercial contracts for goods and services to keep its F-5 aircraft air worthy. *See Honduras,* 129 F.3d at 545-547.

In *Honduras,* the plaintiffs (a corporation) entered into a contract with the country of Honduras for goods and services. *Id.* at 545. Honduras needed to upgrade and modernize its civil aeronautics program. *Id.* Under the contract, the plaintiff established a database containing information Honduras needed in order to admit planes to its registry. *Id.* After a change in leadership, Honduras cancelled the contract, refused to pay, and invoked sovereign immunity, claiming that the registration of aircraft under the Honduras flag was an intrinsically sovereign act. *Id.* at 545-546.

Although the court recognized that "registering aircraft under the Honduras flag is an act peculiar to its sovereignty," it nonetheless concluded that Honduras's contracting for services was in fact a commercial act. *Id.* at 548. The court explained that Honduras "did not have the resources or the technical expertise to conduct its own aircraft inspections or to set up a registry," so it "ventured into the marketplace to find the expertise and resources needed to accomplish those tasks." *Id.* at 547. The plaintiffs in *Honduras* did not argue that the contact gave them

the authority to register aircraft or force Honduras to do so. *Id.* at 548. Instead, the plaintiffs argued that they had contracted to provide services in connection with registering airplanes and were accordingly bringing suit to enforce that contract. *Id.* The court agreed and stated that the activities "were commercial in nature and the type negotiable among private parties." *Id.* at 547.

Similar to Honduras, the Kingdom in the present case sought to upgrade and maintain its F-5 fleet. Like Honduras, the Kingdom "did not have the resources or the technical expertise" to accomplish this. *Id.* Consequently, it "ventured into the marketplace to find the expertise and resources needed to accomplish those tasks." *Id.* In *Honduras,* the plaintiffs contracted to provide services and brought suit to enforce that contract; here, LSI contracted to provide goods and services and brought suit to enforce its contracts. The Kingdom's commercial contracts and subsequent alleged breaches thereof exemplify contracts and conduct typically engaged in by private parties. *Id.*; *Weltover,* 504 U.S. at 614-615; *Callejo v. Bancomer,* S.A., 764 F.2d 1101, 1109 (5th Cir.1985) (stating that contractual obligations and the breach of those obligations is "commercial" conduct).

Moreover, the suggestion that LSI's employees should be considered individual civil servants under the auspicious of a direct employment agreement, rather than as employees of LSI, is unpersuasive. The cases proffered by the Kingdom involve employment

contracts between foreign states and individuals, not between a foreign state and a private contractor to provide goods and services. *See Kato v. Ishihara,* 360 F.3d 106, 111-12 (2d Cir.2004) (Japanese civil servant hired by Tokyo government); *Holden v. Canadian Consulate,* 92 F.3d 918, 921-22 (9th Cir.1996) (commercial officer hired by Canadian consulate); *Mukaddam v. Permanent Mission of Saudi Arabia to United Nations,* 111 F.Supp.2d 457, 462-63 (S.D.N.Y.2000) (employee of Saudi Mission to the United Nations). Neither the TSP nor the SPAGE contracts were direct employment agreements. Unquestionably, it was LSI who recruited, trained, housed, and hired the individuals under the TSP contract. LSI, not the Kingdom, paid the individuals for their work under the TSP contract. The contracts are replete with references to LSI's obligation to hire quality employees and that the employees will be under the direct supervision of LSI. Accordingly, the TSP and SPAGE contracts cannot be construed as direct employment contracts between a foreign state and civil servants.

b. The Kingdom's Acts had a Direct Effect in the United States

The facts and circumstances establish not only that the contracts involved in the instant case are commercial in nature, but also that there was a nontrivial effect in the United States that was an immediate consequence of the Kingdom's activity. *Byrd,* 182 F.3d at 390-91; *Voest-Alpine,* 142 F.3d at

896. Consequently, LSI has established that jurisdiction exists under the "direct effects" prong of the FSIA. *Id.*

"A 'direct effect' need not be substantial or foreseeable, but it must be more than trivial." *Bank of China,* 506 F.3d at 997 (citing *Weltover,* 504 U.S. at 617-18). "And it will be sufficiently 'direct' if it follows as an immediate consequence of the defendant's activity." *Id.* (citing *Weltover,* 504 U.S. at 618) (internal quotations omitted). The Fifth Circuit has held that the financial loss suffered in the United States by a United States corporation constitutes a "direct effect." *Voest-Alpine,* 142 F.3d at 889; *see also Byrd,* 182 F.3d 380, 390 (5th Cir.1999) (finding a direct effect on an American plaintiff who incurred damages such as unilaterally purchasing insurance and expending money to improve a sawmill in Honduras). However, "not every financial loss suffered by an American citizen is sufficient to satisfy the requirement of the direct effects clause." *Wahba v. Nat'l Bank of Egypt,* 457 F.Supp.2d 721, 734 (E.D.Tex.2006) (citing *Voest-Alpine,* stating that the Fifth Circuit has not held that "any financial loss suffered by an American plaintiff, regardless of where that loss was incurred, is alone sufficient to constitute a direct effect. . . .").

When a defendant foresees and aids in the financial loss and harm its activity or inactivity creates for an American company, the direct effects element of the FSIA is satisfied. *Byrd,* 182 F.3d at 391 (holding that the direct effects element satisfied

because the defendants "foresaw and perhaps even helped to plan the financial harms. . . ."); *Strata Heights,* 2003 WL 21145663, at *3-4. The Fifth Circuit's decision in *Bryd* is controlling. In *Bryd,* the plaintiffs claimed damages from unreimbursed expenditures of American resources used to fund overseas projects. 182 F.3d at 390-91. Despite the performance of the contract taking place almost entirely outside of the United States, the Fifth Circuit held that the direct effects element was satisfied. *Id.* at 391.[14] In the present case, the rational outlined in *Bryd* and reiterated in *Strata Heights,* is instructive and this Court reaches a similar result.

LSI alleges that the Kingdom breached the SPAGE contract by failing to provide proper instructions for parts it shipped to the United States, and forcing LSI to incur millions in additional costs storing and safeguarding those parts in San Antonio. In executing the SPAGE contract, the Kingdom knew that it was dealing with an American company that would suffer a direct effect in the United States if the

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[14] *See also Strata Heights,* an unpublished Fifth Circuit case that relies on *Bryd's* discussion of knowledge, intent, and forseeability, noting that the defendant "targeted American corporations as joint venture partners, actively solicited their participation, and then requested that they perform extensive evaluations of Brazilian properties knowing those evaluations would be done with American resources. It was not merely fortuitous that the plaintiffs were American companies; it was part of [the defendant'] business plan." 2003 WL 21145663, at *4.

Kingdom failed to perform. *See Voest-Alpine,* 142 F.3d at 896 (finding a direct effect where the defendant refused to wire money to a Texas bank, as requested by the plaintiff). It is undisputed that LSI housed the airplane parts in the United States, incurred fees for storing those parts, and as an immediate consequence, was forced to expend money from the United States. The failure to pay LSI in the United States had a direct effect on LSI in the United States, and supports jurisdiction under the FSIA. *Id.*

Likewise when the Kingdom entered into the TSP contract, it knew it was dealing with an American company that would suffer harm in the United States if a contract breach occurred. The purpose of the TSP contract was to purchase United States technology and expertise needed to operate and maintain the Kingdom's aircraft. LSI assembled this technical expertise in the United States using United States resources and exported it to the Kingdom. Subsequently, the Kingdom allegedly refused to pay LSI more than $12.2 million for services provided, which allegedly forced LSI to incur millions in unreimbursed housing costs that LSI funded from the United States. These unreimbursed costs and non payments were immediately realized by LSI in the United States, as LSI funded its operations from the United States. Furthermore, LSI contends that the Kingdom drew down the entire amount of LSI's $5.6 million performance bond for the TSP contract without justification. A direct effect of this was that LSI was allegedly forced to reimburse the bank for

the illegal draw, by using its letter of credit at the Texas Capital Bank in Dallas. The direct effects from the Kingdom's actions were immediately felt in the United States.

The TSP contract was subject to U.S. laws and regulations relating to exports, and LSI preformed all recruiting and contract administration services in the United States. Administering the TSP contract from the United States was necessary for the Kingdom to receive the benefits from LSI. This included frequent communication, constant administration, and travel in the United States. It is difficult to conceive how LSI could have performed the TSP contract without such high level of involvement from its Untied States offices, both financially and administratively. Clearly, the Kingdom bargained for the involvement of LSI's United States operation when entering into all of the contracts.

Although the Kingdom argues that the TSP and SPAGE contracts are inherently two distinct agreements, it appears it has linked the agreements together – refusing to release the performance bonds under both contracts, as well as the bid bond for a Navy Billets contract – purportedly because LSI has failed to obtain a tax certificate in connection with the TSP contract. The Kingdom's refusal to release the bonds, and its election to unilaterally hold monies from one contract as collateral for another, contradict any notion that these contracts were entirely dissociative. The two contracts served the same underlying purpose, and operated at such a high level of

coordination and interdependency, that it is clear LSI operated both from the United States. LSI performed the SPAGE contract entirely from the United States, and similarly performed all recruiting services and funding for the TSP contract in United States. LSI's performance under the TSP contract was only possible because its Annapolis office consistently transferred money to the SAMBA bank account so bills could be paid as they came due. Consequently, when the Kingdom failed to pay LSI's invoices, and when LSI incurred additional expenses – the resulting financial losses were incurred and immediately felt at LSI's corporate level in Annapolis. Furthermore, the Kingdom's refusal to release the bonds caused immediate harm in the United States, as LSI paid fees to maintain the bonds *from accounts in the United States.* Therefore, the compounded effects of the Kingdom's actions, including those associated with the Al Bilad Compound and the bid bonds, have been felt directly in the United States.

The Kingdom's argument that the location of the payment prevents jurisdiction fails. *Voest-Alpine,* 142 F.3d at 895; *accord Callejo v. Banocmer, S.A.,* 764 F.2d 1101, 1112 (5th Cir.1985) ("[A]rcane doctrines regarding the place of payment are largely irrelevant."). Although the Kingdom was scheduled to pay LSI in Houston under the SPAGE contract, and through a Saudi bank under the TSP contract, the location of the payment, or in this case, a non-payment, is irrelevant. *Id.* The Fifth Circuit rejected the notion that FSIA jurisdiction depends on the place of

payment or proof of a legally significant act that occurred in the United States. *Id.* at 894-95. Of importance is "whether those effects were felt in the United States." *Id.* As stated before, the effects of the Kingdom's actions and inactions were felt in the Untied States. Thus, jurisdiction is appropriate in the United States.

In accordance with the Supreme Court's decision in *Weltover,* the *Voest-Alpine* court agreed that direct effects need not be substantial or foreseeable, but an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity." 142 F.3d at 893 (*quoting Weltover,* 504 U.S. at 607 (citation omitted)). The court held that "financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction." *Id.* at 897. Although foreseeability and substantiality are not necessary prerequisites for jurisdiction under the FSIA, courts still rely on this when deciding if an effect was direct. *Id.* at 895-96; *see also Byrd,* 182 F.3d at 390-91 (relying heavily on facts relating to defendant's knowledge, motive, and intent when finding jurisdiction); *Strata Heights,* 2003 WL 21145665, at *4 (relying on *Byrd's* discussion of knowledge, intent, and foreseeability). The immediate consequences of the Kingdom's actions, as well as the knowledge and foreseeability factors, are sufficient to support jurisdiction in this Court.

Furthermore, although consequences of the Kingdom's actions may have been realized elsewhere,

direct effects are not mutually exclusive. Whether the Kingdom's acts had a simultaneous effect in Saudi Arabia is not dispositive. The presence of a nontrivial effect that had an immediate consequence in the United States is sufficient under the FSIA. *Voest-Alpine,* 142 F.3d at 896.

The Court finds the Kingdom's attempts to distinguish the *Byrd, Strata Heights,* and *Voest-Alpine* cases are unpersuasive, and those cases are applicable for the reasons stated above. Furthermore, the Kingdom's use of cases such as *Antares Aircraft, L.P. v. Fed. Republic of Nigeria, virtual Countries,* 999 F.2d 33 (2d Cir.1993), and *American Telecom Co., L.L.C. v. Republic of Lebanon,* 501 F.3d 534 (6th Cir.2005) are distinguishable. *See Voest-Alpine,* 142 F.3d at 893 (Fifth Circuit rejecting the legally significant act requirement discussed in *Antares Aircraft*). For example, in *American Telecom,* the Sixth Circuit discussed a factual situation greatly different from the current scenario in this case. The court held that "the mere act of including an American company in or excluding an American company from the process of bidding on a contract, where both parties' performance is to occur entirely in a foreign locale, does not, standing alone, produce an immediate consequence in the United States." 501 F.3d at 541. However, in the present case, the facts are distinguishable because LSI performed extensive services in and from the United States that constituted direct effects, unlike the one-time $25,000 bid in *American Telecom. Id.* at 536-37. The additional cases provided

by the Kingdom are also factually distinguishable and are unpersuasive.

Having concluded that jurisdiction is proper, and that the Kingdom's activities have made it amenable to suit in the United States, the Court will discuss the Kingdom's alternative *forum non conveniens* claim at this juncture.

B. Forum Non Conveniens

(1) The Legal Standard

Under the doctrine of *forum non conveniens,* a district court may dismiss a case when an alternative forum has jurisdiction to hear the case and the chosen forum is oppressive and vexatious to a defendant. *Kemple v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1141 (5th Cir.1989); *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 241, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Additionally, when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may dismiss the case. *Ocean Drilling,* 876 F.2d at 1141 (quoting *Koster v. Lumbermens Mut. Cas. Co.,* 330 U.S. 518, 524, 67 S.Ct. 828, 91 L.Ed. 1067 (1947)).

The doctrine of *forum non conveniens* comes from the premise that "in rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 722, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996).

"*Forum non conveniens* enables a court to decline to exercise its jurisdiction if the moving party establishes that the convenience of the parties and the court and the interests of justice indicate that the case should be tried in another forum." *Punyee ex. rel Doe v. Bredimus,* 2004 U.S. Dist. LEXIS 22762, at *10 (N.D.Tex. Nov. 5, 2004) (quoting *Karim v. Finch Shipping Co. Ltd.,* 265 F.3d 258, 268 (5th Cir.2001)). When resolving a motion to dismiss where the alternate forum is a foreign tribunal, federal courts must apply the federal version of *forum non conveniens. Vasquez v. Bridgestone/Firestone, Inc.,* 325 F.3d 665, 671 (5th Cir.2003).

The defendant bears the burden of moving to dismiss in favor of a foreign forum and this burden applies to all of the elements of a *forum non conveniens* analysis. *In re Air Crash Disaster Near New Orleans,* 821 F.2d 1147, 1164 (5th Cir.1987). The burden on the defendant seeking *forum non conveniens* dismissal is a strong one; the cases "make it clear that dismissal is to be the exception, not the rule, and there must be a strong showing that the alternative forum would be significantly more convenient and better serve justice than the one chosen by the plaintiff." 14D Charles A. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3828, (3d ed.2007).[15]

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[15] The Supreme Court recently reiterated in *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.,* ___ U.S. ___,

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To obtain a dismissal the defendant must demonstrate and satisfy a two-part test: (1) the existence of an available and adequate forum; and (2) that the balance of the relevant private and public interest factors favor dismissal.[16] *Vasquez,* 325 F.3d at 671.

"When performing the *forum non conveniens* factor-based analysis, the 'ultimate inquiry' for the court is to determine 'where the trial will best serve the convenience of the parties and the ends of justice.'" *Clough v. Perenco, L.L.C.,* 2007 WL 2409357, at *1 (S.D.Tex. Aug.21, 2007) (*citing Piper Aircraft,* 454 U.S. at 251-252). First, a court must determine whether an alternative forum exists that is both adequate and available. *In re Air Crash Disaster Near New Orleans,* 821 F.2d at 1165.

___, 127 S.Ct. 1184, 1191, 167 L.Ed.2d 15 (2007), that "[a] defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." Additionally, the Court noted that when the plaintiff's chosen forum is not the plaintiff's home forum, "the presumption in the plaintiff's favor 'applies with less force.'" *Id.* In the present case, LSI's chosen forum is LSI's home forum.

[16] In reality, the first part requires two separate inquiries (availability and adequacy) and the second part also requires two separate inquiries (private and public factors). The Second Circuit includes a third step in this analysis and first asks the level of deference that is given to the plaintiff's forum choice. *See In re Air Crash Near Nantucket Island, Mass. on Oct. 31, 1999,* 2004 WL 1824385 (E.D.N.Y. Aug.16, 2004).

Once a court determines there is an available and adequate alternative forum, it may then proceed to balance whether the private interest factors weigh in favor for or against dismissal. *Vasquez,* 325 F.3d at 672. Relevant private factors include: (1) the plaintiff's forum choice; (2) access to sources of proof; (3) availability of compulsory process to ensure attendance of unwilling witnesses; (4) possibility of viewing premises, if viewing is appropriate in the litigation; (5) other practical problems that affect the trial, including enforceability of judgment and whether the plaintiff has selected an improper forum to harass the defendant. *Id.*; *see also Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *McLennan,* 245 F.3d at 424; *Baumgart v. Fairchild Aircraft Corp.,* 981 F.2d 824, 826 n. 12 (5th Cir.1993).

If the private factors do not weigh in favor of dismissal, the court must then consider public interest factors. *In re Air Crash Disaster Near New Orleans,* 821 F.2d at 1164. Public interest factors include: (1) administrative difficulties regarding court congestion; (2) local interest in having localized controversies decided at home; (3) interest in having a diversity case in a forum familiar with the law; (4) unnecessary problems with conflicts of law, or applying foreign law; and (5) unfairness of burdening citizens in an unrelated forum with jury service. *Dickson Marine Incorp. v. Panalpina, Inc.,* 179 F.3d 331, 332 (5th Cir.1999) (quoting *Piper Aircraft,* 454 U.S. at 241 n. 6). The above list of private and public

factors are not exhaustive, "and some factors may not be relevant in the context of a particular case." *Van Cauwenberghe v. Baird,* 486 U.S. 517, 528-29, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988). No one factor is dispositive, and when considered in conjunction, the factors provide a flexible inquiry. *Piper Aircraft,* 454 U.S. at 249-50.

(2) Whether Saudi Arabia is an Available and Adequate Forum

An alternative foreign forum is *available* when "the entire case and all parties can come within the jurisdiction of that forum." *Vasquez,* 325 F.3d at 671; *In re Air Crash Disaster Near New Orleans,* 821 F.2d at 1165. An available alternative forum is *adequate* when "the parties will not be deprived of all remedies or treated unfairly" even though the same benefits may not be enjoyed. *In re Air Crash Disaster Near New Orleans,* 821 F.2d at 1165; *Vasquez,* 325 F.3d at 671 (quoting *Gonzolez v. Chrysler Corp.,* 301 F.3d 377, 379-80 (5th Cir.2002)).

It appears LSI does not dispute that Saudia Arabia is an available forum. Therefore, the Court will consider whether it is an adequate forum. LSI contends that there are numerous compelling reasons that weigh against trying this case in Saudi Arabia. First, LSI argues that Saudi Arabia is inadequate because the Saudi Board will discount the testimony of LSI's witnesses, which will ultimately favor the Kingdom. Furthermore, LSI states that the Kingdom

controls the Saudi Board and can literally dictate the outcome of LSI's claims, which is of great concern when the Kingdom is a party to the case, a member of the royal family is a key witness, and the Kingdom feels the case is a matter of national security.

LSI further argues that the Saudi Board is not adequate because it can discriminate against LSI's witnesses when weighing evidence; the Kingdom can control the Saudi Board's resolution of the claims, and because of the nature of the claims, this is likely to be the case; and the Saudi Board is not institutionally independent from the Kingdom's executive branch.

The Kingdom responds that LSI's forum choice deserves no deference; that Saudi Arabia is both available and adequate; and that the private and public interest factors strongly favor dismissal. The Kingdom further argues this case should be resolved by the Saudi Board because it regularly handles government contract claims identical to LSI's claims and the contracts at issue expressly identify the Saudi Board as the forum to resolve "any" dispute. *Def.'s Mot. to Dismiss,* p. 19.

The Court is mindful that this is a highly-individualized inquiry that depends on the facts of each case. *Piper Aircraft,* 454 U.S. at 249050.[17] Thus,

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[17] Because this is a fact-specific inquiry, the cases offered by the Kingdom, *Forsythe* and *Gonzalez,* are not dipositive. For example, in *Gonzalez,* a Peruvian national sought damages for

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the Court will discuss LSI's concerns regarding the adequacy of the Saudi Board as a forum.

a. Discrimination

LSI contends that the Saudi Board's evidentiary principals give the Kingdom an enormous "home court advantage" that precludes a fair trial for LSI. According to LSI, the Saudi Board considers the testimony of Saudi nationals to be inherently more credible than that of non-Muslims, adding that the testimony of women is given half the weight of a man, and judges are required to discount the testimony of non-Muslims. This is troubling as all of LSI's witnesses are non-Saudis and non-Muslims. Because the Kingdom has the power to make witness credibility an issue as a litigation tactic, LSI contends that this evidentiary bias makes the Saudi Board inadequate. *See Presbyterian Church,* 244 F.Supp.2d at 335-36 (non-Muslims' reduced rights under Shariah law, including "diminished testimonial competence," was part of the reason that the Sudanese courts were not an adequate alternative forum for non-Muslim plaintiffs).

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her Peruvian son's death that occurred on a Peruvian ship during a voyage that began and ended in Peru. *Gonzalez v. Naviera Neptuno A .A.,* 832 F.2d 876, 977 (5th Cir.1987). Similarly, *Forsythe* involved wrongful termination claims against the Kingdom's airline, by a commercial pilot who had worked exclusively outside the United States. *Forsythe v. Saudi Arabian Airlines Corp.,* 885 F.2d 285, 287 (5th Cir.1989).

Experts for both parties appear to acknowledge that the Saudi Board considers factors such as the nationality, religion, and gender of the witness when assessing witness credibility. Additionally, there are statements indicating that the Saudi Board follows the Hanbali school of Islamic jurisprudence, which allows a judge to discount non-Muslim testimony. The Kingdom indicates that the Saudi Board usually places more weight on documentary evidence, which may well be the case. However, a tendency to place greater weight on certain evidence over other diminished evidence, does not entirely eradicate the presence of a bias, or make a given forum fair. Although the issue of a built-in credibility bias is not entirely dispositive, it creates a genuine question as to whether all parties – non-Muslims – will be "treated fairly" in the alternate forum.

b. Control over the Saudi Board

LSI argues that the Saudi Board is not adequate because the Kingdom can control the Saudi Board's resolution of its claims. Acknowledging that the political structure of a country does not necessarily render a forum inadequate, in the instant case, and given the present factual circumstances, the Kingdom's ability to police itself suggests that the Saudi Board is not an adequate forum. LSI provides commentary by both the Kingdom's expert and its own expert for the assertion that the Saudi Board's independence and impartiality as a judicial body should be questioned because of the opportunity to be

influenced by the executive power. The scholars provided by both parties are impressive and eminent in their respective fields.

Furthermore, it is clear that the same separation of power, which tends to secure judicial autonomy in the United States, has not yet been completely realized in Saudi Arabia. For example, the King's unlimited authority appears to extend over the judiciary – the Saudi Board – and include the ability to amend or overrule the Saudi Board's judgments. This would normally be of little concern, except for the fact that the current case is, by the Kingdom's own admission, of national importance, and involves a member of the royal family, Prince Turki. The Kingdom's ability to function as an appellate court, with power to overrule a decision by the Saudi Board, raises questions as to whether the Saudi Board is a less than desirable forum to adequately and fairly adjudicate a claim against the Kingdom.

Moreover, LSI indicates that the Saudi Board does not possess autonomy when dealing with cases that involve national security. According to LSI, the Saudi Board will sometimes refuse to hear cases involving national security (aircraft contracts, naval contracts, and training of soldiers). Citing scholarly work on the subject, LSI suggests that the Kingdom even directs the Saudi Board's decision on national security matters. The Kingdom has acknowledged that this case is one it considers to be highly classified and involving national security information.

Thus, LSI's argument creates a genuine concern over the autonomy of the Saudi Board.

While the Court is able to locate cases where Saudi Arabia has been found to be an adequate forum, it is unable to locate authority on point concerning evidentiary bias and claims against the Kingdom that allegedly raise national security concerns. The Kingdom has not cited cases involving national security issues that came before the Saudi Board, and its experts have not handled cases of national security interest. There is no question that the Saudi Board has found for plaintiffs in suits against the Kingdom and even awarded damages. However, this alone does not satisfy the Kingdom's burden. *See Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F.Supp. 1337, 1342 (S.D.N.Y.1982), aff'd, 727 F.2d 274 (2d Cir.1984) (finding that the defendants did not establish the adequacy of an alternative forum by simply citing instances where the forum decided against the government's interest).

Furthermore, these cases involved issues not necessarily of national security importance. Because the *forum non conveniens* analysis is case and fact specific, the majority of cases regarding the adequacy of a given forum are instructive but not determinative. It is important to note that although the Kingdom does not offer cases showing the Saudi Board's independence in the national security issues, LSI similarly does not provide instances of improper influence. Circumstantial evidence provided by LSI,

including accounts by regional scholars, indicates that the Kingdom has control over the Saudi Board and that the judges are not entirely autonomous. This is exacerbated in the national security context. While this does not establish that the Saudi Board is an inadequate forum, it raises concerns over the level of fairness afforded to LSI in this particular case.[18]

Despite the assertions of LSI, the Court is hesitant to declare Saudi Arabia as a presumptively inadequate forum. Still, the Court is wary to discredit and diminish the factors listed by LSI as they tend to lend credence, due to the specific facts of this case, to the inadequacy of litigation against the Kingdom in the Kingdom. Nevertheless, because the Court is hesitant to declare Saudi Arabia an inadequate forum, the Court will consider the private and public factors in the *forum non conveniens* analysis.[19]

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[18] *See Sangeorzan v. Yangming Marine Transp. Corp.*, 951 F.Supp. 650, 654 (S.D.Tex.1997) (the plaintiff may not be treated fairly by Taiwanese courts because the defendant was owned in part by Taiwanese government); *Daventree Ltd. v. Republic of Azerbijan*, 349 F.Supp.2d 736, 756 (S.D.N.Y.2004) (finding that defendants had not shown that Azerbaijan courts could function independently from executive branch); *BP Chemicals*, 2004 U.S. Dist. LEXIS 27855, at *34-35 (finding Chinese courts inadequate for claims against defendants owned by Chinese government where record indicates risk of government interference with judiciary).

[19] Additionally, the cases proffered by the Kingdom, for the proposition that LSI has conceded that Saudi Arabia is an adequate forum for suits not involving the Kingdom are of no moment. The Kingdom argues that since LSI has engaged in

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(3) Public and Private Factors

Even if the Saudi Board is determined to be adequate, LSI argues that the Kingdom has failed to show that the balance of private and public interest factors justify stripping LSI of its forum choice, or that this Court is oppressive and vexatious. In its analysis of the public and private factors below, the Court observes that "[w]hen considering private and public factors in determining whether to dismiss a case, 'no one . . . factor should be given conclusive weight,' *In re Air Crash Near New Orleans,* 821 F.2d at 1163, because '[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable,' *Piper Aircraft,* 454 U.S. at 249-50. Accordingly, the Court will weigh the private and public factors, as set forth below.

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previous litigation with its employees in Saudi Arabia, and even represented that the particular litigation should take place in Saudi Arabia, there can no longer be a question of the adequacy of the forum. However, in this particular instance the adequacy issue is not whether LSI believes Saudi Arabia is an adequate forum for the Saudi Board to adjudicate litigation between an American company and its American employee. Instead, LSI's concern is whether Saudi Arabia is the adequate forum as LSI seeks redress against the Kingdom itself, regarding what the Kingdom describes as a national security matter, as that redress is marshaled by the Saudi Board, which the Kingdom arguably controls.

a. Private Factors

Even assuming that Saudi Arabia is an adequate alternate forum, the Kingdom still has the burden, notwithstanding the presumption accorded to LSI's choice of forum, to show that the balance of private and public interests *requires* dismissal. *See Manu Int'l, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 65 (2d Cir.1981). After reviewing the factors below, the Court finds the Kingdom has failed to meet its burden.

i. LSI's forum choice

There is a "strong presumption in favor of the plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Schexnider v. McDermott Int'l, Inc.*, 817 F 2d 1159, 1163 (5th Cir.1987) (citing *Piper*, 454 U.S. at 255). "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508.

The Kingdom asserts that "in some cases, the plaintiff's choice of forum is given some deference. However, this principle has no applicability here." *Mot. to Dismiss*, at 44. To support this argument, the Kingdom relies upon cases distinguishable from the instant case.

Furthermore, the Kingdom argues that LSI's forum choice should be marginalized because LSI does not have sufficient ties to this judicial district.

Mot. to Dismiss, at 45. The Kingdom cites cases for the proposition that the forum choice should be given less weight and virtually no weight. *Id.* However, the cited cases address a transfer of venue and establish that under § 1404(a), "the plaintiff's choice of forum is not accorded the decisive weight it enjoyed under the doctrine of *forum non conveniens.*" *See Empty Barge Lines II, Inc. v. Dredge Leonard Fisher,* 441 F.Supp.2d 786, 797 (E.D.Tex.2006); *see also* 14D Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3828 (3d ed.2007) (noting that standards for *forum non conveniens* and Section 1404 transfers should not be confused); *Cont'l Airlines, Inc. v. Am. Airlines, Inc.,* 805 F.Supp. 1392, 1395 (S.D.Tex.1992). The motion currently before the Court is not a Section 1404 motion.

The Court is reminded that burden on the movant is relatively high:

> Although the doctrine frequently is discussed in terms of 'convenience,' it probably is better thought of as a doctrine about avoiding 'undue burden.' A plaintiff's choice of forum should be disturbed only if the burden on the defendant and the chosen federal court is undue, taking into account the relationship among several factors, including the circumstances and nature of the case, the parties, and the United States.

14D Wright, Miller & Cooper, *supra,* at § 3828. Again, "the plaintiff's choice of forum should rarely be

disturbed." *Torreblanca de Aguilar v. Boeing Co.*, 806 F.Supp. 139, 143 (E.D.Tex.1992) (citing *Gulf Oil*, 330 U.S. at 508)." *Blum v. Gen. Elec. Co.*, 547 F.Supp.2d 717, 725 (2008). With this standard in mind, and according deference with LSI's forum choice, the Court proceeds with its analysis of the private interest factors.

ii. Access to Proof and the Compulsory Process

The Kingdom is "unlikely to be inconvenienced by having to defend this action in this court against witnesses and exhibits that may be impossible for the plaintiff to produce." *Penge v. Hillenbrand Indus., Inc.*, 228 F.Supp.2d 929, 935 (S.D.Ind.2002). Because witnesses are located in both countries, and mostly under the control of the parties, dismissal to Saudi Arabia is not necessarily warranted. *See Bund Zur*, 2006 WL 3197645, at *8 (discounting importance of witness location when witnesses were located in both Germany and the United States); *Kimberly-Clark Corp. v. Cont'l Cas. Co.*, 2005 WL 2679698, at *5 (N.D.Tex. Oct.19, 2005) (stating that because witnesses were located in both Brazil and the United States, dismissal was not supported). It is true that both the district court and the Saudi Board have the ability to compel unwilling witnesses within their respective forums. Additionally, witnesses in Saudi Arabia are mostly under the Kingdom's control and can be compelled to testify as well. *See Torres*, 107 F.Supp.2d at 780 (recognizing that a foreign

defendant would be able to secure its witnesses' testimony or trial attendance).[20] LSI notes that there are third-party witnesses (such as LSI's Saudi accountants) that are not under the Kingdom's control, or within reach of this Court. However, LSI states that the Saudi accountants are likely to testify for LSI, and if they do not it will only benefit the Kingdom (because they will testify to the Kingdom's misreporting of LSI's income to the taxing authorities). The inability to compel the accountant witnesses appears to be to LSI's detriment.

Additionally, LSI juxtaposes the Kingdom's argument regarding the importance of compelling witnesses in Saudi Arabia, with its assertion that the Saudi Board may not even consider witness testimony. The possibility of non-witness testimony in Saudi Arabia serves to diminish this factor in the balancing analysis. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.,* 1992 WL 159334, at *9 (N.D.Ill. Jun.30, 1992) (noting that "any consideration of compulsory process as the penultimate issue is irrelevant if the court need not consider such testimony once it is offered to the court").

"This is not a case where all the relevant documents and all the necessary witnesses are found in the foreign forum, such that convenience mandates dismissal." *Bund Zur,* 2006 WL 3197645, at *8. For

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[20] However, there is concern that the Saudi Board cannot compel members of the royal family.

example, evidence exists, under the control of both parties, in both the United States and in Saudi Arabia. None of LSI's witnesses are fluent in Arabic, however, it appears that many of the Kingdom's witnesses are proficient in both English and Arabic. Despite the fact that both the SPAGE and TSP contracts provide that any correspondence be in both English and Arabic, there is evidence to suggest that a good portion, or even the majority, of the documentary evidence is in Arabic. However, some of the key documents have already been translated. Whether the case is adjudicated in the United States or before the Saudi Board, translation will be necessary to some extent. If the majority of the evidence is in Arabic, this factor favors dismissal. Nevertheless, the Court finds that the other factors and concerns in the analysis weigh in favor of retaining jurisdiction over the case. The Court also observes that whether the case is handled in Saudi Arabia or the United States, due to the international nature of this dispute, travel costs and administrative hassle will have an impact on both parties.

iii. Viewing Premises

A site visit is not necessary in this case. The Kingdom argues that the Saudi Board is in a better position to resolve the claims regarding the Al Bilad Compound, because a view of the premises is only possible in Saudi Arabia. LSI counters that a jury visit to the Al Bilad Compound is not necessary for it to pursue its claim. The gravaman of this case is a

contract dispute. Demonstrative evidence, such as photographs and diagrams, will suffice in place of a view of the premises for any of the controverted claims in this case. After reviewing the relevant facts and the allegations regarding the Al Bilad Compound, the Court finds that this factor weighs against dismissal.

iv. Problems Enforcing Judgment

There does not appear to be an issue regarding enforcing a potential judgment against the Kingdom.

Viewing the private factors, and giving appropriate deference to LSI's forum selection, the Court finds that the private interest factors weigh in favor of litigating the case in this forum.

b. Public Factors

"If the district court finds that the private interests do not weigh in favor of the dismissal, it must then consider the public interest factors." *In re Air Crash Disaster Near New Orleans,* 821 F.2d at 1165. The Court examines the relevant public factors below.

i. Administration

The Kingdom has not shown that this Court is oppressive or vexatious, or that administrative or legal problems warrant overriding LSI's forum choice. *Bund Zur,* 2006 WL 3197645, at *3 (finding a court

can override the plaintiff's forum choice only if the defendant proves that the American forum creates "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience" or because of the court's own administrative and legal problems). Furthermore, the *forum non conveniens* doctrine "should not be invoked simply to shift the inconvenience from one party to another." *Torres de Maguera v. Yacu Runa Naviera* S.A., 107 F.Supp.2d 770, 780 (S.D.Tex.2000). In the instant case, the litigation of this matter will result in some inconvenience to both parties. Although the Kingdom argues that litigation before the Saudi Board is *more* convenient, it has not established that LSI's forum choice creates an oppressiveness and vexation that is out of proportion to LSI's convenience. *See Bund Zur,* 2006 WL 3197645, at *2. The Court reiterates that dismissal is to be the exception, not the rule. This is not one of those exceptions.

The Kingdom has not indicated particular administrative difficulties associated with LSI's forum choice that should warrant change. LSI has stressed its concern that the Kingdom can defer litigation in perpetuity because it allegedly exerts control over the Saudi Board. LSI highlights this Court's experience with the Kingdom at the outset of this litigation and contends that although the Kingdom was eventually forced to actively engage due to this Court's Order, such delay tactics will only be exacerbated if the litigation is before the Saudi Board, thus making finality of this matter indefinite. *See Bhatnagar v.*

Surrendra Overseas Ltd., 52 F.3d 1220, 1228 (3d Cir.1995) (holding that evidence of "profound" and "extreme" delay, averaging between ten and fifteen years to process cases in India, rendered India an inadequate forum). LSI provides evidence that cases involving the Kingdom, or members of the royal family, can extend years even decades due to the Saudi Board's deference to a defendant's not showing up and its willingness to grant continuances. Thus, this factor weighs in favor of retaining the case in this Court.

ii. Local interest and fairness to the community

There is a local interest in having localized controversies decided at home. *Gilbert,* 330 U.S. at 509. Both the United States (and in particular Texas) and Saudi Arabia have an interest in the case by virtue of the citizenship of the parties. Certainly, Saudi Arabia has an interest in handling disputes that arise from contracts in which it engages in its own forum. However, it does not outweigh the local nexus to this community or the community's interest in ensuring that contracts that affect its members are enforced. There is an interest in ensuring that this community and United States citizens who enter into international commerce are not forced to protect their interest in other nations. *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1104 (11th Cir.2004) ("[T]here is a strong federal interest in making sure that plaintiffs who

are United States citizens generally get to choose an American forum for bringing suit, rather than having their case relegated to a foreign jurisdiction. . . .") (citation omitted); *Prevision*, 94 F.Supp.2d at 781 (recognizing that "the United States and Texas have very strong interests in adjudicating Plaintiffs' contentions" where a number of events relating to the controversy took place in Texas). In particular, the members of this community have an interest in this litigation because LSI, UNC's parent company, is based in Austin, Texas; LSI's San Antonio office administered the SPAGE contract; LSI has and continues to store nearly 150 F-5 aircraft parts in this community; and LSI employs over four hundred people in Bexar county.[21]

This is just the type of case a local jury should hear. Although there are international aspects to this litigation and also at the heart of the underlying contracts, it will not be unfair for a member of this community to serve on a jury in this matter. Furthermore, this case does not involve multiple plaintiffs and defendants. Although the case has been somewhat document rich, juries in this Court perform ably in very complicated matters, and often review matters that involve an enormous breadth of information.

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[21] *See also Taylor Devices, Inc. v. Walbridge Aldinger Co.*, 538 F.Supp.2d 560 (W.D.N.Y.2008); *Prime Materials Recovery, Inc. v. Martin Roy Transport*, 2008 WL 2095550, at ___ 2-5 (D.Conn. May 16, 2008).

The Supreme Court has stated that "[j]ury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil,* 330 U.S. at 509-10. Given that this case is connected to the Western District of Texas through the storage of the F-5 aircraft parts in San Antonio, as well as LSI's residency, the Court finds that there is a relation to this forum. Therefore, the Court finds that this factor does not weigh in favor of dismissal.

iii. Applying Foreign Law and Conflict of Law

Avoiding "unnecessary problems in conflict of laws, or in the application of foreign law" factors into a court's analysis when considering *forum non conveniens* dismissal. *Vasquez,* 325 F.3d at 673 (citation omitted). The Kingdom argues that the case should be dismissed because Saudi law applies; LSI argues that it has yet to be definitively determined whether American law applies, or a combination of both depending on the specific issues. The fact that foreign law may govern a case "is not in itself reason to apply the doctrine of forum non conveniens" and grant a dismissal. *Schexnider v. McDermott Int'l, Inc.,* 817 F.2d 1159, 1164 (5th Cir.1987) (citations omitted). Courts must not be "reluctа[nt] to undertake the task of deciding foreign law, a chore federal courts must often perform." *Id.* (citing *Manu Int'l.,* 641 F.2d at 63. Although having to apply foreign law may be a burden, "it is not alone enough to push the balance of

convenience strongly in favor of [the] defendant." *Manu Int'l,* 641 F.2d at 68.

The issue of interpreting the impact of foreign law will, undoubtedly be briefed and addressed regardless of the forum. It appears to the Court that certain aspects of the contract reference both Saudi law and American law. However, there is not enough evidence at this point to establish that the contract is governed by Saudi law. The Kingdom's reference to Saudi law on individualized topics does not support the proposition that Saudi law governs the entire contract. Furthermore, because the Saudi Board will also have to address a choice of law analysis, and possibly apply foreign law, this factor does not favor either forum. *See Bund Zur,* 2006 WL 3197645, at *11; *Prevision Integral de Servicios Funerarios, S.A. de C.V. v. Kraft,* 94 F.Supp.2d. 771, 781-82 (W.D.Tex.2000) (stating that "[b]ecause 'foreign law' will apply regardless of the forum . . . application of 'foreign law' is unavoidable," thus it does not favor dismissal). Additionally, the Court observes that numerous U.S. federal courts have interpreted Saudi law. *See, e.g., Arabian Teading & Chem. Indus. Co. Ltd. v. The B.F. Goodrich Co.,* 823 F.2d 60, 62-63 (4th Cir.1987); *Nat'l Group for Commc'ns and Computers Ltd. v. Lucent Techs. Int'l Inc.,* 331 F.Supp.2d 293-301 (D.N.J.2004); *Chadwick v. Arabian Am. Oil Co.,* 656 F.Supp. 857, 860-62 (D.Del.1987); *see also Levine v. Arabian Am. Oil Co.,* 1985 U.S. Dist. LEXIS 13386, at *15-17 (S.D.N.Y. Nov. 27, 1985) (citing federal cases applying Saudi law). This Court, while understanding

that having to do so is a consideration in the *forum non conveniens* analysis, does not find that this factor does weighs in favor of dismissal.

After balancing the public interest factors, the Court does not find that there is a strong showing that the alternate forum, when weighed against LSI's forum choice, is significantly more convenient and will better serve the interest of justice.

IV. Conclusion

For the reasons stated above, the Court finds that the Kingdom's Motion to Dismiss based on the FSIA and *forum non conveniens* (Docket No. 101) is DENIED. Accordingly, the Court will retain jurisdiction over this case.

It is so ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50857

CONSOLIDATED WITH 08-51103

SEALED APPELLEE 1; SEALED APPELLEE 2

Plaintiffs-Appellees

v.

SEALED APPELLANT 1; SEALED APPELLANT 2

Defendants-Appellants

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON PETITIONS FOR REHEARING EN BANC

(Filed Sep. 11, 2009)

(Opinion 8/18/09 5 Cir., ___, ___ F.3d ___)

Before DAVIS, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having

requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Signature]
United States Circuit Judge

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No. 09-687

Supreme Court, U.S.
JAN 13 2010

IN THE
Supreme Court of the United States

UNC LEAR SERVICES, INC. AND
LEAR SIEGLER SERVICES, INC.,

Petitioners,

V.

KINGDOM OF SAUDI ARABIA AND
MINISTRY OF DEFENSE AND AVIATION OF
THE KINGDOM OF SAUDI ARABIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11, a foreign state was immune from suit for alleged breach of a military defense contract for employment of military personnel and related tort claims.

2. Whether the court of appeals correctly recited the facts of the case based on the plain language of the foreign military defense contracts at issue.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.3d 210. Pet. App. 1-26. The opinion of the district court denying Respondents' motion to dismiss based on foreign sovereign immunity and *forum non conveniens* is available at 2008 WL 2946059. *Id.* at 27-86. The orders of the district court denying Respondents' motions to dismiss based on contractual forum selection clauses and the act of state doctrine are unreported. KRE3-030 to 032; KRE4-033 to 035.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2009. Petitions for rehearing were denied in a *per curiam* order on September 11, 2009. Pet. App. 87-88. The petition for a writ of certiorari was filed on December 10, 2009. Petitioners (together, "Lear") invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT

1. Respondents, the Kingdom of Saudi Arabia and its Ministry of Defense and Aviation (together, the "Kingdom"), maintain a fleet of F-5 aircraft as part of the Kingdom's air defense systems. Pet. App. 2. The Kingdom purchased these aircraft from the United States government and, for many years, the Kingdom

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[1] We use the same shorthand as the Petition to cite to materials that are not included in the Appendix to the Petition. *See* Pet. nn.2-6.

contracted with the United States to obtain support services for the F-5 fleet. *Id.* The United States used private contractors, such as Lear, to fulfill the terms of those support agreements. *Id.*

In the mid-1990s, the Kingdom invited private contractors to bid directly to provide military support services for the F-5 fleet. *Id.* Two of Lear's bids were accepted. In 1995, the Kingdom and Lear entered into the F-5 Spare Parts and Ground Equipment ("SPAGE") contract. *Id.*; DX 1. More than a year later, in 1996, the Kingdom awarded a separate contract to Lear, the F-5 Technical Support Program ("TSP") contract. Pet. App. 3; DX 2. Both contracts specify a court in Saudi Arabia, the Board of Grievances, as the proper forum to resolve "[a]ny disputes" arising under the contracts. Pet. App. 19; KRE6-090.

Under the SPAGE contract, the Kingdom sent F-5 aircraft parts to Lear in San Antonio, Texas for repair. Pet. App. 2-3. Lear was responsible for arranging repair of the parts and returning them to the Kingdom in Saudi Arabia. *Id.* at 3.

Under the separate TSP contract, Lear sent hundreds of workers to Saudi Arabia to "augment, assist, train and advise" the Royal Saudi Air Force ("RSAF"). *Id.*; *accord* KRE6-096; *see also id.* ("The objective of this program is to use Contractor manpower to augment the RSAF in the accomplishment of the [RSAF] mission."). These Lear employees integrated into the RSAF chain of command, working "directly for and under the functional control of the RSAF" in Saudi Arabia. Pet. App. 3; *accord* KRE6-099; KRE6-097

("All directed manning augmentees provided by this [contract] shall be functionally controlled by the RSAF."). The TSP workers obtained access to "restricted security information" of the Saudi military, DX 2, General Provisions § 17, and many were required to possess a secret security clearance from the United States government. *See* DX 20.

The TSP contract specified, among other things, that Lear's employees within the RSAF would:

- provide flight operations, command, weapons, tactics, and life support training to RSAF personnel;
- operate a survival training center to educate RSAF aircrews in pre/post-ejection procedures, terrain-specific survival techniques, rescue and recovery operations, and escape and evasion methods;
- advise and assist with chemical warfare training;
- provide logistical support related to F-5 missile and munitions maintenance, disarmament and deployment, aircraft damage assessment, and engineering;
- operate a photo reconnaissance lab to train RSAF aircrews in aerial photo reconnaissance; and
- provide operational support for F-5 training simulators.

Pet. App. 3-4; DX 2, Annex B §§ 3, 4, 7, 8.

After both contracts expired in 1999, *see* Pet. App. 5; KRE6-088, several disputes arose. In 2003 and 2004, the parties met on multiple occasions in an unsuccessful effort to resolve Lear's grievances. Pet. App. 5. Lear could have filed suit, as the contracts specify, in the Board of Grievances in Saudi Arabia, but Lear did not do so.

2. Instead, on November 5, 2004, Lear sued the Kingdom in the United States District Court for the Western District of Texas. Pet. App. 6; Doc. 1. In its Complaint, Lear asserted claims for breach of the SPAGE and TSP contracts and various tort claims based on, among other things, an alleged order by the RSAF Deputy Commander, decisions by the Saudi taxing authority, and multiple legal proceedings in the Saudi courts. Doc 1:26-33.

The Kingdom moved to dismiss for improper venue based on the forum selection clauses in the SPAGE and TSP contracts. Pet. App. 6; LRE31; *see* Pet. App. 19; KRE6-090. On August 30, 2005, the district court denied the motion to dismiss on the ground that the forum selection clauses were purportedly permissive. Pet. App. 6; KRE3-032.

Thereafter, the Kingdom moved to dismiss on other grounds, including immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 ("FSIA"), *forum non conveniens*, and the act of state doctrine. Pet. App. 6. On March 2, 2006, the district court denied the motion in part, authorized jurisdictional discovery, and scheduled briefing only on foreign sovereign immunity and *forum non conveniens*. *Id.* at 6-7; KRE4-033 to 035.

On July 25, 2008, the district court denied the Kingdom's motion to dismiss based on foreign sovereign immunity and *forum non conveniens*. Pet. App. 27-28. First, the district court held that the Kingdom was amenable to suit in the United States under the FSIA's "commercial activity" exception to sovereign immunity. 28 U.S.C. § 1605(a)(2). Considering the contracts together as a single integrated whole, the court held that they were commercial in nature and that the Kingdom's alleged actions caused direct effects in the United States. Pet. App. 48-63. As to the nature of employing military personnel, the district court stated that this activity is governmental in nature only where employees serve "under the auspicious [*sic*] of a direct employment agreement," and not, as here, through a foreign state's contract with a third party. *Id.* at 54. The district court also denied the Kingdom's motion to dismiss for *forum non conveniens*, applying a "strong presumption" in favor of Lear's choice of a United States forum. *Id.* at 75-77.

3. On August 19, 2009, a unanimous panel of the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the denial of dismissal.[2] *Id.* at 1-26. Considering the contracts

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[2] The Kingdom appealed the denial of dismissal on foreign sovereign immunity grounds under the collateral order doctrine and sought review of the act of state issue based on the court of appeals' pendent appellate jurisdiction. Pet. App. 7. The court of appeals granted permission for the Kingdom to appeal the denial of dismissal based on the forum selection clauses and *forum non conveniens* after the district court certified those issues for immediate review under 28 U.S.C. § 1292(b). Pet. App. 7.

separately, the court of appeals held that, under the FSIA, the Kingdom is immune from Lear's claims related to the TSP contract, but not from Lear's claims related to the SPAGE contract. *Id.* at 8-18.

Applying the standard set out by this Court in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), which requires courts to focus on the nature of an activity rather than its purpose, the court of appeals held that the TSP contract was governmental in nature and thus Lear's TSP claims did not fall within the commercial activity exception. The court explained that Lear's TSP employees "were integrated with the RSAF" and, as the contract states, they "provided flight operations services and training to the RSAF," "trained pilots in survival skills, including escape and evasion, and ejection over sea, desert, or mountain terrain," and "performed maintenance on the F-5 aircraft . . . ." Pet. App. 12. The court further stated that "[u]nlike a contract to buy army boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide personnel that were vital to the operation of a national air defense system." Pet. App. 12. The court thus held that "[w]hile the purpose of the TSP contract was undeniably sovereign, the nature of the contract was also sovereign. The TSP employees were integrated into the RSAF and can be considered military personnel." *Id.*

The court of appeals also held, however, that "[t]he SPAGE contract is precisely the type of transaction the Supreme Court discussed in *Weltover*. . . . Regardless of the end use of the F 5 components in aircraft that were used for national defense, the SPAGE contract was

for goods and services and is properly construed as commercial activity." Pet. App. 15. As the court explained, the SPAGE and TSP contracts differed in nature because "[t]he SPAGE employees were not integrated with the RSAF, and therefore unlike the personnel working under the TSP contract, they cannot be considered military personnel." *Id.* at 14.

The court of appeals also affirmed the denial of dismissal based on the SPAGE forum selection clause and *forum non conveniens*, discussing only "the controversy regarding the SPAGE contract . . . ." *Id.* at 24. The court did not address the Kingdom's arguments based on the act of state doctrine because those arguments pertained only to Lear's claims under the TSP contract. *Id.* at 25-26.[3]

On September 11, 2009, the court of appeals denied petitions for rehearing in a *per curiam* order. *Id.* at 87.

ARGUMENT

A. The Court of Appeals Correctly Applied Settled Law to the Specific Facts of this Case

Lear contends that certiorari is warranted because the court of appeals supposedly erred in holding that the TSP contract was governmental in nature. That fact-bound contention is incorrect and, in all events, would not warrant this Court's plenary review.

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[3] Simultaneously with this brief, the Kingdom is filing a conditional cross-petition with respect to the court of appeals' *forum non conveniens* holding. *See* Sup. Ct. R. 12.5.

1. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in a civil action brought in a United States court. *Argentine Republic v. Armada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). Under the FSIA, foreign states are immune unless a claim falls within one of several specified exceptions. 28 U.S.C. § 1604. As relevant in this case, the "commercial activity" exception provides that a foreign state is not immune with respect to a claim based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* § 1605(a)(2). The FSIA defines the term "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the [activity], rather than by reference to its purpose." *Id.* § 1603(d). Courts applying the commercial activity exception accordingly focus on the nature, not the purpose, of a foreign state's activity. *Weltover*, 504 U.S. at 612.

2. Lear concedes that the court of appeals correctly "acknowledged that controlling authority required it to look at the nature, and not the purpose, of the TSP . . . ." Pet. 17; *accord* Pet. for Reh'g En Banc at 8 (same); Pet. for Panel Reh'g at 11 ("[T]he Opinion correctly states the test for determining whether an activity is commercial for purposes of the FSIA . . . ."). Lear nevertheless contends that the court of appeals, on the particular facts of this case, based its decision "on the purpose of the TSP contract" rather than its nature. Pet. 17. That contention does not withstand scrutiny.

After quoting in full the statutory definition of "commercial activity" (including the directive to focus on the nature of a foreign state's activity rather than its purpose), the court of appeals discussed at length this Court's "helpful explanation of the commercial activity exception in [*Weltover*]," specifically this Court's emphasis on the nature of an activity rather than its purpose. Pet. App. 9-11. In assessing the nature of the TSP contract, the court of appeals emphasized that Lear's TSP employees "worked directly for and under the control of the RSAF," *id.* at 12; those employees "were integrated into the RSAF and can be considered military personnel." *Id.*; *accord id.* ("Employees under the TSP contract performed their work in Saudi Arabia and were integrated with the RSAF."); *id.* at 3 ("These employees were integrated with RSAF personnel . . . .").

The court of appeals further explained that, as the contract states, the TSP workers "provided flight operations services and training to the RSAF," "trained pilots in survival skills, including escape and evasion, and ejection over sea, desert, or mountain terrain," and "performed maintenance on the F-5 aircraft . . . ." *Id.* at 12. Based on these factors, the court held that the TSP contract was governmental in nature. *Id.* at 12-13; *see* H. Rep. 94-1487, 94th Cong., 2d Sess., at 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 ("public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel," whereas employment of "clerical staff or public relations or marketing agents" is commercial in nature).

In reaching this conclusion, the court of appeals faithfully applied this Court's decision in *Weltover*:

> Unlike a contract to buy army boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide *personnel* that were vital to the operation of a national air defense system. While the purpose of the TSP contract was undeniably sovereign, the nature of the contract was also sovereign. *The TSP employees were integrated with the RSAF and can be considered military personnel.*

Pet. App. 12 (emphases added); *see Winter v. Natural Resource Def. Council*, 129 S. Ct. 365, 377 (2008) ("[D]ecisions as to the composition, training, equipping, and control of a military force . . . are essentially professional military judgments." (citation and internal quotation marks omitted)); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (holding that a foreign state's agreement with a U.S. contractor for employment of security personnel was governmental in nature).

Lear incorrectly faults the court of appeals for acknowledging that Lear's TSP employees helped "minimiz[e] the time aircraft were unavailable for defense" and were "vital to a national air defense system." Pet. 17-18 (quoting Pet. App. 12). According to Lear, those statements address the purpose of the TSP contract, not its nature, and thus the court of appeals erred. *Id.* Lear's conclusion, however, does not follow from its premise. As discussed, the court of appeals explained that the TSP contract was

governmental both in purpose *and* in nature: "While the purpose of the TSP contract was undeniably sovereign, the nature of the contract was also sovereign." Pet. App. 12. Merely noting the purpose of an activity, while ultimately relying on the nature of the activity, does not, as Lear suggests, "direct[ly] contraven[e]" *Weltover*. Pet. 17.

Indeed, the court of appeals' holding with respect to the SPAGE contract illustrates that the court was acutely aware of the distinction between the nature and purpose of an activity, and that the nature of the activity is controlling. The court held that the SPAGE contract was commercial in nature notwithstanding its governmental purpose, thus concluding that the Kingdom was not immune from claims under the SPAGE contract. In contrast to the TSP, the court stated that "[t]he SPAGE contract is precisely the type of transaction the Supreme Court discussed in *Weltover*. . . . Regardless of the end use of the F 5 components in aircraft that were used for national defense, the SPAGE contract was for goods and services and is properly construed as commercial activity." Pet. App. 15. The court explained that the SPAGE and TSP contracts differed in nature because "[t]he SPAGE employees were not integrated with the RSAF, and therefore unlike the personnel working under the TSP contract, they cannot be considered military personnel." *Id.* at 14.

3. Contrary to Lear's suggestion, the decision below does not create any division of circuit authority warranting this Court's review. Pet. 15-18. First, none of the cases Lear cites conflicts with the decision below because none involved employment of military personnel, the central factor in the court of appeals' analysis of the nature of the TSP contract.

Thus, *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006), on which Lear primarily relies, Pet. 16-17, is entirely inapposite to the TSP contract. In that case, a police informant filed suit in the United States after Peru reneged on its offer of a $5 million reward for anyone providing information leading to the location and capture of a fugitive. *Guevara*, 468 F.3d at 1293. The Eleventh Circuit rejected Peru's FSIA defense, holding that "the underlying activity at issue – the exchange of money for information – is commercial in nature" and thus the informant's claims fell within the commercial activity exception. *Id.* at 1299. Unlike the Kingdom's TSP contract, however, in *Guevara*, the foreign state did not contract to *employ* law enforcement personnel or otherwise to augment its police or military.[4]

Second, the decision below does not, as Lear suggests, conflict with prior Fifth Circuit decisions. Pet. 15-18 (relying on *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), and *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375 (5th Cir. 1992)). On the contrary, the court of appeals in this case did not disturb any of its prior decisions and, in fact, favorably cited *Walter Fuller Aircraft Sales* to support its holding that the SPAGE contract was commercial in nature. Pet. App. 15. The Fifth Circuit then declined to credit Lear's claims of an intra-circuit conflict in petitions for rehearing. *See* Pet. App. 87-88; Pet. for

[4] Lear also identifies numerous cases involving government contracts that were held to be commercial in nature, but none involved employment of military personnel and, in all events, none conflicts with the court of appeals' decision holding that the TSP contract was governmental in nature. *See* Pet. 15-17 & n.7 (citing cases).

Reh'g En Banc at 7-8. In any event, this Court does not sit to resolve asserted intra-circuit conflicts. *Wisniewski v. United States*, 353 U.S. 901, 901 (1957) (per curiam).

4. Grasping at straws, Lear also contends that this Court should grant review to address a supposed "circuit split" in cases involving "employment disputes between foreign governments and consular or civil service personnel." Pet. 33. But this case, which involves *military* personnel, is not an appropriate vehicle to address an issue involving alleged *diplomatic* and *civil service* personnel. As Lear concedes, the cases reflecting the supposed split "do not apply" here. Pet. 24. None of those cases involved employment of military personnel, and most did not even involve employment of consular or civil service personnel. *See El-Hadad v. United Arab Emirates*, 496 F.3d 658, 667 (D.C. Cir. 2007) ("We therefore hold that El-Hadad is not a civil servant . . . ."); *Holden v. Canadian Consulate*, 92 F.3d 918, 922 (9th Cir. 1996) (employee was "more analogous to a marketing agent" than a diplomat or civil servant); *Segni v. Commercial Office of Spain*, 835 F.2d 160, 166 (7th Cir. 1987) (employee was a "marketing agent" and "cannot be considered either as a civil servant or a diplomatic officer").

In all events, there is no division of circuit authority. In the cases on which Lear relies, as here, courts of appeals, consistent with *Weltover*, determined the character of a foreign state's activity based on its nature rather than its purpose. *See Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004) (court's "central inquiry" was the "distinction made in the text of the FSIA between activities that are by nature 'commercial' and those that are not"); *Holden*, 92 F.3d at 922 ("[W]e examine the nature of the act, and not

the purpose behind it."); *Segni*, 835 F.2d at 163 ("[T]he nature, rather than the purpose, of the act under scrutiny . . . will guide us to our ultimate conclusion.").

Moreover, contrary to Lear's suggestion, the D.C. Circuit in *El-Hadad* did not recognize a circuit split. 496 F.3d at 664 n.2. In fact, the D.C. Circuit specially noted that, "like many of our sister circuits, we have held that a foreign government's civil servants (and diplomats and soldiers) do *not* qualify for the commercial activity exception." *Id.* at 664 (citing *Kato*, *Holden*, and *Segni*). Notwithstanding this language of consensus, the sovereign defendants in *El-Hadad* sought certiorari based on the same supposed "split" now advocated by Lear. Pet. for a Writ of Certiorari at 19-24, United Arab Emirates v. El-Hadad, 128 S. Ct. 1872 (2008) (No. 07-853), 2007 WL 4631295 (Dec. 20, 2007). This Court denied review in *El-Hadad*. 128 S. Ct. 1872 (2008).

5. Finally, Lear requests that this Court resolve a question Lear contends was "left open" in *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 n.4 (1993), concerning treatment of an activity that has both governmental and commercial elements. Pet. 31. In the proceedings below, however, Lear did not raise this issue and, thus, neither the district court nor the court of appeals addressed it.[5] Accordingly, the issue is not properly before this Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily, this Court does not decide questions not raised or involved in the lower court."); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (same).

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[5] Lear raised this issue for the first time in a petition for rehearing in the court of appeals. *See* Pet. for Reh'g En Banc at 9-10.

Even if Lear had preserved the issue, this is not a so-called "'mixed' case that involves sovereign and commercial elements." Pet. 31. *All* of the TSP workers were "integrated into the RSAF," Pet. App. 12, and "worked directly for and under the functional control of the RSAF." *Id.* at 3. That those workers performed various functions within the Saudi military is irrelevant and, in fact, improperly emphasizes the purpose rather than the nature of the TSP contract, which was for employment of "military personnel," *id.* at 12, whatever their function.

B. The Court of Appeals Correctly Recited the Facts of this Case

Unable to show that the decision below misstates the law, Lear seeks to mire this Court in the facts of the case, arguing that the court of appeals relied on "new findings of fact not mentioned by the district court (or found in the record) and other facts contrary to the district court's factual findings." Pet. 22-23; *see id.* at 27 (acknowledging that the decision below involved "fact-intensive determinations by [the] appeals court"); Pet. for Panel Reh'g at 3 ("Based on [a] misapprehension of fact, the Panel determined that the TSP contract was not commercial in nature."). But this Court does not sit to review factual findings. *See* Sup. Ct. R. 10.

In any case, the court of appeals did not disturb the district court's factual findings or find any new facts. Rather, the court of appeals relied on the plain terms of the parties' contracts to assess the nature of each and, with respect to the TSP, reached a different legal conclusion than the district court. Thus, there is no

reason for Lear's extended discussion of the correct standard of review from a district court's jurisdictional findings of fact in an interlocutory FSIA appeal under the collateral order doctrine. *See* Pet. 23-27.

Tellingly, Lear fails to identify any fact that the court of appeals found contrary to the district court. Lear asserts that "there is no support in the record for the assertion that [the TSP workers] were 'integrated' into the RSAF or could 'be considered military personnel.'" Pet. 27-28 (quoting Pet. App. 12) (emphasis omitted). But the TSP contract expressly states that Lear "shall provide directed manning augmentee personnel to work directly for and under the functional control of the RSAF" in Saudi Arabia. KRE6-099; *accord* KRE6-097 ("All directed manning augmentees provided by this [contract] shall be functionally controlled by the RSAF."); *see also* KRE6-099 ("The RSAF may direct that any Contractor directed manning personnel be sent . . . to any location."). The court of appeals correctly stated that, as set out in the contract, the TSP workers were integrated in the RSAF as military personnel. This is not inconsistent with the district court's statement that recruitment and hiring were Lear's responsibilities. *See* Pet. 28 (quoting Pet. App. 55).

Next, Lear asserts that the record "contains no support for the Fifth Circuit's statement that [Lear's] employees were providing 'vital' services that were 'sovereign' in nature." Pet. 28 (quoting Pet. App. 12). Lear's own allegations in this case, however, demonstrate the critical import of the TSP contract to the Saudi military. *See, e.g.*, Doc. 1:5 (TSP contract was "needed to operate [the Kingdom's] F-5 aircraft");

id. at 6 ("At its core, the F-5 TSP contract required [Lear] to recruit technically-qualified personnel in the United States and export the expertise and services of these individuals from the United States to assist and train [RSAF] personnel."). In all events, it is beyond reasonable dispute that this Court's review is unwarranted to revisit whether Lear's services were vital.[6]

Finally, the court of appeals did not err in disregarding the Kingdom's so-called "admissions" that the TSP was a "direct commercial contract." Pet. 29 (citing DX 2, Annex B; Appx. 140, 161-65). Saudi military officers used that characterization in Saudi Arabia in the mid-1990s to distinguish the Kingdom's contracts with private contractors such as Lear from its contracts with other sovereigns. The use of this shorthand nomenclature, which Lear wrenches out of context to suggest some connection to this litigation, has no bearing on the legal question whether Lear's TSP claims fall within the FSIA's commercial activity exception to sovereign immunity.

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[6] The record also supports – and Lear does not meaningfully dispute – the court of appeals' other observations regarding the TSP workers, including that they "provided flight operations services and training to the RSAF," "trained pilots in survival skills, including escape and evasion, and ejection over sea, desert, or mountain terrain," and "performed maintenance on the F-5 aircraft." Pet. App. 15.

C. Lear Dramatically Overstates the Ramifications of the Court of Appeals' Decision

As to the broader significance, if any, of the decision below, Lear devotes its energy to hyperbole and tearing down straw man arguments.

For example, Lear asserts that the decision below would allow foreign states, in violation of federal regulations, to "transfer U.S. military technology to Iran or North Korea, without any legal recourse in the United States . . . ." Pet. 22. As support for this ominous declaration, Lear points to a Technical Assistance Agreement ("TAA") signed by the Kingdom in connection with the TSP contract. *Id.* at 21-22. However, Lear is not even a party to the TAA, which was a separate agreement between the Kingdom and the United States government. *See* LRE 35-36. The enforceability of the TAA is not at issue in this case, and nothing in the decision below would permit the Kingdom (or others) to violate federal regulations prohibiting the transfer of U.S. military technology.

Lear also asserts that the decision below "threatens the viability of DCS [direct commercial sales] arrangements" under the Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq.* Pet. 21. According to Lear, the court of appeals' reasoning indicates that "virtually" all foreign military defense contracts, including all contracts for "vital" or "military-related services," are governmental in nature. *Id.* But Lear's doomsday warning rings especially hollow in light of the court's holding that the SPAGE contract, a DCS agreement, was commercial in nature. Pet. App. 15.

For its part, Lear proposes the untenable rule that all government contracts are commercial. *See* Pet. 15-18. The decision below, however, does not reflect any broad pronouncement; rather, the court of appeals reached fact-bound determinations only as to the nature of the SPAGE and TSP contracts, *see* Pet. 27, relying, for the TSP, on the nature of employment of "military personnel." Pet. App. 12. Other DCS contracts, such as the SPAGE, may well be commercial in nature, but those questions are not before this Court.

In addition, the court of appeals did not, as Lear suggests, "create an entirely new distinction between 'goods' and 'services'" for purposes of the commercial activity exception to sovereign immunity. Pet. 18. Again, Lear's contention is belied by the court of appeals' approach to the SPAGE contract. The court determined that "the SPAGE contract was for goods *and services* and is properly construed as commercial activity." Pet. App. 15 (emphasis added). Moreover, as stated, the court's analysis of the nature of the TSP contract focused on employment of "military personnel," *id.* at 12, and not broadly on all services.

Lastly, Lear complains that the decision below leaves Lear (and potentially other U.S.-based defense contractors) without a remedy. Pet. 21. On the contrary, the SPAGE and TSP contracts contain forum selection clauses that specify resolution of any disputes in the Board of Grievances in Saudi Arabia. Pet. App. 19; KRE6-090. Whether those contractual forum selection clauses are mandatory or permissive, they specifically provide a remedy, which Lear itself elected to decline, in Saudi Arabia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

UNC LEAR SERVICES, INC.
AND LEAR SIEGLER SERVICES, INC.,

Petitioners,

v.

KINGDOM OF SAUDI ARABIA AND
MINISTRY OF DEFENSE AND AVIATION
OF THE KINGDOM OF SAUDI ARABIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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SUMMARY OF ARGUMENT

The Kingdom's Opposition misconstrues the law, misstates the record, and merely highlights why LSI's Petition should be granted. **First**, LSI's Petition demonstrated that the Fifth Circuit's Opinion directly contravenes this Court's decisions in *Nelson* and *Weltover*. In response, the Kingdom claims that the Opinion faithfully applied *Weltover* but supports that claim with a quote in which the Fifth Circuit attempted to *distinguish Weltover* on the ground that it discussed a contract to buy army boots and bullets, while this case involves contracts to provide services that, according to the Fifth Circuit, were "vital" to an air defense and were performed by personnel "integrated" into the Saudi military.

This was not a faithful application of *Weltover*. The question is not whether LSI's personnel provided services "vital" to a sovereign purpose or whether they were integrated into the military; the "issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992). The answer, under *Weltover*, is self-evident: it is absolutely ordinary for private parties that own aircraft to contract for the maintenance of those aircraft. The Fifth Circuit reached the wrong conclusion because it asked the wrong question, in direct contravention of this Court's precedent.

Second, LSI's Petition demonstrated that this case raises exceptionally important issues because the Fifth Circuit's Opinion threatens to undermine a primary method under U.S. law for providing military goods and services to foreign governments – the direct commercial sales arrangement. Under that arrangement, a foreign government must enter into a Technical Assistance Agreement ("TAA"), as the Kingdom did here, promising not to transfer U.S. military data to third parties. If the Kingdom is immune from suit under the underlying direct commercial sales agreement, as the Fifth Circuit held, the Kingdom also would be immune from suit under the collateral TAA, thus placing U.S. military technology at risk.

The Kingdom responds by misrepresenting the record. It falsely asserts that LSI is not a party to the TAA and that the Kingdom's agreement not to transfer U.S. military data is with the U.S. government. To correct the record, LSI includes key portions of the TAA below, which confirm that the "parties" were LSI and the Royal Saudi Air Force and that they expressly agreed that the underlying contract was "commercial."

Third, LSI demonstrated that the Fifth Circuit contravened this Court's decisions restricting review under the collateral order doctrine to legal issues by relying on new facts not included in, and directly contrary to, the district court's findings. Again, the Kingdom's response highlights why LSI's Petition should be granted. The Kingdom asserts that the Fifth Circuit properly "disregard[ed]" its prelitigation

admissions that the TSP contract was "commercial" because these statements supposedly were taken out of context. But the district court expressly relied on these admissions as support for its finding that "the record, including the Kingdom's own admissions, establishes that the Kingdom's conduct in connection with the TSP and SPAGE contracts was commercial in nature and satisfies the first prong of the commercial activities exception." (App. 48.) By "disregarding" these admissions, with no analysis or acknowledgment of the district court's findings, the Fifth Circuit contravened this Court's decisions restricting review of collateral orders to legal issues.

LSI's Petition should be granted.

ARGUMENT

I. The Kingdom's Opposition Confirms That The Fifth Circuit Contravened This Court's FSIA Precedent.

LSI demonstrated that its Petition should be granted because the Fifth Circuit's Opinion contravenes this Court's directives in *Nelson* and *Weltover*. (Pet. 11-16.) *Nelson* instructs courts conducting an FSIA analysis to focus on the "particular conduct" by the defendant that forms the basis for the complaint. *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-57 (1993). *Weltover* instructs that the "issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of

actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614-15. When a foreign government "acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.*

The Fifth Circuit's Opinion contravenes both directives. Instead of focusing on the particular conduct *by the Kingdom* that forms the basis for LSI's claims (*i.e.*, contracting to purchase services and the subsequent refusal to pay), the Opinion focuses on the purpose of the work performed by LSI's employees and whether those employees were "integrated" with the Saudi military. (App. 12-13.) And rather than examining whether the Kingdom acted as a market participant, the Opinion examines whether LSI's employees can be "considered" military personnel. (*Id.*)

The Kingdom attempts to defend the Opinion, asserting it does not conflict with this Court's precedent because it quoted "the full statutory definition of 'commercial activity'" and discussed "at length" this Court's "helpful" explanation of the commercial activities exception in *Weltover*. (Opp. 9.) According to the Kingdom, even though the Fifth Circuit based its conclusion on its finding that the services LSI provided were "vital" to a "national air defense," the court actually was looking at nature and not purpose. (Opp. 9-10.)

The Kingdom's argument merely underscores the rift between the Opinion and this Court's precedent.

First, it confirms that the Fifth Circuit did not faithfully apply *Weltover*. The Kingdom asserts that the Opinion followed *Weltover* by stating that "[u]nlike a contract to buy army boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide personnel that were vital to the operation of a national air defense." (Opp. 10.) But as this passage makes clear, the Fifth Circuit was not applying *Weltover*; it was attempting to *distinguish it* on the ground that this case involves a contract to provide "personnel" that supposedly were "integrated" with the RSAF, rather than "army boots or bullets."

But this proffered distinction is not valid under *Weltover*. Even accepting the Fifth Circuit's recharacterization of the TSP as a contract to provide "personnel," the question under *Weltover* is whether entering into and then breaching a contract for personnel are "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 504 U.S. at 614. The answer is self-evident. And this is why there are countless decisions following *Weltover* and holding that contract disputes involving agreements to provide goods or services (even military goods and services) are "commercial" in nature. (Pet. 15-16.)

The Kingdom claims these decisions are inapposite because none involved a contract to employ "military personnel," which the Kingdom says is the "central factor" in the Fifth Circuit's analysis. (Opp. 11.) But this is an exercise in semantics and provides no justification for the Opinion's departure from

Weltover. A contract to provide personnel who provide services is a contract to provide services. The Kingdom could not provide these services itself, so it entered the marketplace, received bids from private American defense contractors, and ultimately entered into a direct commercial relationship with LSI. (App. 52-54, citing *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 548 (11th Cir. 1997).) LSI recruited technically-qualified personnel in the U.S., exported their expertise and services to Saudi Arabia, and managed every aspect of their work, including providing housing, transportation, and payroll. (App. 32-33, 55.) The Kingdom then refused to pay. Under *Weltover*, this is commercial activity; the fact that the services and personnel had a military *purpose* is irrelevant. 28 U.S.C. § 1603(d).

In addition to highlighting the departure from *Weltover*, the Kingdom's Opposition confirms that the Opinion contravenes *Nelson*'s directive to focus on the particular conduct of the defendant forming the basis for the complaint. *See Nelson,* 507 U.S. at 356. The Kingdom's brief does not even challenge LSI's showing that the Opinion contravenes *Nelson* – nor could it. The Fifth Circuit's analysis of the TSP is focused entirely on LSI's employees. (App. 12-13.) The analysis does not even mention, much less focus on, the Kingdom's conduct – namely, contracting with a private party and refusing to pay for the services provided.

If the Fifth Circuit had followed *Nelson* and *Weltover*, it could only have reached the conclusion

reached by the district court: "the Kingdom's commercial contracts and subsequent alleged breaches thereof exemplify contracts and conduct typically engaged in by private parties." (App. 54.)

II. The Kingdom's Opposition Misrepresents The Record And Confirms The Importance Of This Case.

LSI's Petition also demonstrated that this case involves issues of exceptional importance to the U.S. defense contracting industry. (Pet. 20-22.) By holding that the Kingdom is immune from this breach-of-contract suit, the Opinion threatens a primary method available under U.S. law to provide military services to foreign governments – namely, the direct commercial sales arrangement – because it leaves the contractor without a remedy when, as here, the foreign sovereign elects not to pay. The importance of this case is further highlighted by a TAA signed in connection with the TSP contract in which the Kingdom agreed to comply with U.S. arms control regulations. The Fifth Circuit's rationale would make the Kingdom immune from any effort to enforce the TAA, leaving U.S. military technology at the whim of a foreign government.

The Kingdom responds by misrepresenting the record, stating that "Lear is not even a party to the TAA, which was a separate agreement between the Kingdom and United States government." (Opp. 18.) This assertion is demonstrably false, as the TAA

expressly states that LSI is a "party" and the TSP is "commercial":

> TECHNICAL ASSISTANCE AGREEMENT . . . *by and between Lear Siegler Services, Inc. (hereinafter referred to as "LSI")* . . . and the Royal Saudi Air Force (hereinafter referred to as "RSAF") . . . (hereinafter referred to as the "Parties").
>
> . . . .
>
> Upon the terms and subject to the conditions contained in this TAA, the Parties agree that LSI will provide the RSAF with primary mission and logistics support for the RSAF F-5 weapon system under a follow-on three year *direct commercial contract* with the Ministry of Defense and Aviation (MODA). LSI will provide 628 technically qualified directed manning personnel to augment, assist, train and advise RSAF personnel in the operation, maintenance, and logistics support of the F-5 aircraft fleet.
>
> . . . .
>
> 5. The technical data or defense services exported from the United States in furtherance of this TAA and any defense articles which may be produced or manufactured from such technical data or defense service may not be transferred . . . [without State Department approval].

(LRE 35-36 (emphasis added).)

Besides misrepresenting the record, the Kingdom wrongly asserts that nothing in the Opinion allows it to violate U.S. law prohibiting the transfer of military technology. (Opp. 18.) But the TAA was entered into in connection with the TSP contract and is the sole document requiring the Kingdom, a foreign sovereign, to comply with U.S. arms control restrictions. (App. 32.) The TAA is an integral part of the direct commercial sales arrangement, and specifically prohibits the transfer of defense technical data, services or articles to third parties. (LRE 35-36.) If the Kingdom is immune from suit under the TSP contract, it would be immune from a suit by LSI seeking to enforce the TAA. The Kingdom identifies no other way to enforce its obligation not to transfer this information, and the Fifth Circuit's Opinion thus places U.S. military data and technology at risk.

Ignoring these risks, the Kingdom attempts to downplay this case's significance, arguing that the decision is "fact-bound" and pointing to the Fifth Circuit's conclusion regarding the SPAGE contract as proof. Again, the Kingdom's argument only highlights this case's importance. The only distinction made between the TSP and SPAGE contracts is that LSI's TSP employees supposedly were "integrated" with the Saudi military whereas the SPAGE employees were not. (App. 14.) The sole bases for this conclusion are provisions in the TSP contract stating that LSI's employees were to work "directly for and under the functional control of the RSAF." (Opp. 16.) If the Fifth Circuit's Opinion is allowed to stand, it would provide

the blueprint for foreign governments to circumvent the jurisdiction of U.S. courts in a case involving a direct commercial sales agreement: simply include a contractual provision stating the government will have functional control of the contractor's employees.

Finally, the Kingdom contends that the Fifth Circuit's Opinion leaves LSI with a remedy because "the SPAGE and TSP contracts contain forum selection clauses that specify resolution of any disputes in the Board of Grievances in Saudi Arabia." (Opp. 19.) Again, the Kingdom misstates the record. The Fifth Circuit explicitly held that, because of the Kingdom's own actions, "the Board never became available as a forum." (App. 21.) The court therefore rejected the Kingdom's argument: "if we accept the Kingdom's argument that the Board is the exclusive forum to resolve this dispute, Lear would be denied a remedy because the remedy the Kingdom points to in the SPAGE contract was never triggered." (*Id.*)

III. The Opposition Confirms That The Fifth Circuit Contravened Supreme Court Precedent Restricting Review Under The Collateral Order Doctrine To Legal Issues.

LSI demonstrated this Petition also should be granted because (i) the Fifth Circuit's decision directly contravenes this Court's precedent restricting review under the collateral order doctrine to legal issues; and (ii) there is a divergence in the standards of review courts are applying when reviewing interlocutory

immunity appeals under the FSIA (clear error) as compared to interlocutory appeals denying qualified immunity for domestic government officials (no review of factual questions). (Pet. 22-30.)

In response, the Kingdom does not dispute that review of collateral orders is restricted to legal issues. Nor does the Kingdom contest LSI's showing that there is a divergence in how courts are reviewing factual disputes on interlocutory appeals under the FSIA, with some courts, including the Fifth Circuit, holding that factual findings may be reviewed for clear error. (Pet. 26-27.) *This split is uncontested and alone warrants review by this Court.*

The Kingdom nonetheless attempts to defend the Fifth Circuit, asserting erroneously that the Opinion merely applied the "plain terms" of the TSP contract and that LSI failed "to identify any fact that the court of appeals found contrary to the district court." (Opp. 15-16.) Yet, the Kingdom also asserts that whether the Fifth Circuit correctly concluded that the TSP contract was governmental in nature is a "fact-bound" contention. (Opp. 7.) The Kingdom cannot have it both ways, arguing in one part of its brief that the issue is "fact-bound" and in another part that the Fifth Circuit merely addressed a legal issue.

In truth, the relevant facts were found by the district court after considering binders of exhibits, as well as declarations from LSI employees directly involved in administering the TSP contract. The district court found that "the record, including the Kingdom's

own admissions, establishes that the Kingdom's conduct in connection with the TSP and SPAGE contracts was commercial in nature and satisfies the first prong of the commercial activities exception." (App. 48.) The Kingdom ignores this finding, as well as the material differences between the new "facts" relied on by the Fifth Circuit and those found by the district court.

Indeed, the key "fact" relied on by the Fifth Circuit (that LSI's employees supposedly were integrated with the RSAF) is mentioned nowhere in the district court's opinion. To the contrary, the district court expressly rejected the Kingdom's assertion that LSI's employees were "so enmeshed in the daily activities and operations of national security that the underlying acts were sovereign." (App. 51.) The district court instead found that:

> Neither the TSP nor the SPAGE contracts were direct employment agreements. Unquestionably, it was LSI who recruited, trained, housed, and hired the individuals under the TSP contract. LSI, not the Kingdom, paid the individuals for their work under the TSP contract. The contracts are replete with references to LSI's obligation to hire quality employees and that the employees will be under the direct supervision of LSI.

(App. 55.) Under this Court's precedent, the Fifth Circuit had no authority to review these factual findings, much less come up with new ones. *See Coopers &*

Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (allowing collateral appeal to turn on facts "thrusts appellate courts indiscriminately into the trial process").

Contrary to the Kingdom's suggestion, granting this Petition will not require the Court to become "mired" in the facts. The Court need only compare the courts' decisions to readily recognize that the supposed facts relied on by the Fifth Circuit are different from – and in fact directly contrary to – those actually found by the district court.

Finally, and perhaps most tellingly, the Kingdom asserts that, even though the Fifth Circuit was limited to reviewing legal issues, it "did not err in *disregarding* the Kingdom's so-called 'admissions' that the TSP was a 'direct commercial contract.'" (Opp. 17 (emphasis added).) This assertion proves LSI's point. LSI submitted evidence to the district court that the Kingdom repeatedly stated that the TSP contract was "commercial," including the Kingdom's agreement in the TAA that the TSP was a "direct commercial contract." (Pet. 29; LRE 35-36.) The district court based its finding that the TSP was commercial, at least in part, on these admissions. (App. 48.) When it "disregard[ed]" this finding, the Fifth Circuit – in violation of Supreme Court precedent – undertook a plenary review of the facts. It is even more troubling that the Fifth Circuit undertook this review *sub silentio*, with no discussion of the proper standard under the collateral order doctrine.

CONCLUSION

LSI respectfully requests that the Court grant its Petition and review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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